CLERK'S COPY

PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 141

THE UNITED STATES, PETITIONER

vs.

FACTORS & FINANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 7, 1933
CERTIORARI GRANTED OCTOBER 10, 1933

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 141

THE UNITED STATES, PETITIONER

vs.

FACTORS & FINANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	1	1
Petition	11	6
Exhibit "A" (claim for refund)	19	11
Exhibit "B" (amended claim for refund)	21	12
Exhibit "C" (letter from commissioner)	25	14
General traverse	29	16
Argument and submission of case	29	16
Special findings of fact	30	16
Conclusion of law	34	21
Opinion, Littleton, J	34	21
Judgment of the court	40	26
Clerk's certificate [omitted in printing]	41	26
Order allowing certiorari		27

1 In the Supreme Court of the United States

October term, 1932

No. 141

THE UNITED STATES, PETITIONER

v.

FACTORS & FINANCE COMPANY

Petition for a writ of certiorari to the United States Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case rendered March 7, 1932, and reported in 56 F. (2d) 902.

QUESTION PRESENTED

Within the statutory period for filing claims for refund respondent filed a general claim which did not specify any particular ground for its allowance or state any facts in support of the claim. After the period for filing claims had expired, respondent filed an amendment to the original claim for refund, which did specify the ground upon which refund was sought. The question is whether this was a sufficient compliance with the statute requiring claims for refund to be filed within a stated period in order to maintain a suit for the recovery of a tax.

STATUTES AND REGULATIONS INVOLVED

R. S. 3228 (a) as reenacted in section 1012 of the revenue act of 1924, c. 234, 43 Stat. 253, 342, provides:

2 "SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the revenue act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum."

R. S. 3226 as reenacted in section 1113 of the revenue act of 1926, c. 27, 44 Stat. 9, 116, provides:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been

erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 284 of the revenue act of 1926, c. 27, 44 Stat. 9, 66, provides in part as follows:

"SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the revenue act of 1917, the revenue act of 1918, the revenue act of 1921, or the revenue act of 1924, or any such act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-
3 profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

"(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

"(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund."

Article 1036 of regulations 62, promulgated under the revenue act of 1921, provides in part:

"CLAIMS FOR REFUND OF TAXES ERRONEOUSLY COLLECTED.—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath."

Similar regulations have been in force under all the income tax acts.

STATEMENT

Respondent sued in the Court of Claims to recover an overpayment of $19,995.44 of income and excess-profits taxes for the year 1917. The court found the facts as follows:

Respondent filed its income and excess-profits tax return for the year 1917 on June 15, 1918, and paid the reported tax of $177,338.72 on or about that date. In August, 1920, an additional tax of $25,-327.91 was assessed for 1917. Respondent paid $9,388.57 of
4 this assessment, and filed a claim for abatement of the balance of $15,933.34, in October, 1920. The commissioner ordered an investigation of respondent's affairs in connection with the claim for abatement. Following the investigation he notified respondent, in January, 1923, that it had been overassessed for the year 1917.

On February 27, 1923, respondent filed with the collector of internal revenue for Rhode Island a claim for refund of $177,606.04 for the year 1917. The claim stated that it was filed "in order to save the taxpayer's rights under the pertinent statutes covering abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due." The claim for refund was received by the commissioner on March 20, 1923. Before then he had concluded his consideration of the claim for abatement and determined that respondent had been overassessed $3,293.89 for the year 1917. A certificate of overassessment was accordingly sent to respondent in November, 1923, and in that month respondent paid $12,639.45, the balance of the additional assessment of 1920 as reduced by the amount of overassessment, plus $3,028.24 in interest.

On July 17, 1925, the commissioner not having acted on the February, 1923, claim for refund, respondent filed an amendment to and amplification of that claim, asking special assessment of the 1917 tax under section 210 of the revenue act of 1917, c. 63, 40 Stat. 300, 307, which authorized a special method of assessment where the invested capital was not satisfactorily determinable.

5 The commissioner took the claim for refund under consideration, and, after a hearing on June 22, 1926, concluded that the profits tax for 1917 should be computed under section 210 of the 1917 act. He therefore determined that respondent had been overassessed for 1917 by the sum of $32,634.89, all of which had been paid. On January 13, 1927, the commissioner notified respondent that $19,995.44 of the overpayment was barred by the statute of limitations, since the claim for refund of February 27, 1923, did not ask for special assessment under section 210 of the revenue act of 1917, and the claim for refund of July, 1925, which did, was not filed within the statutory period. In April, 1927, a certificate of overassessment for the part of the tax which was not barred by limitations was issued, and in June, 1927, the sum of $12,639.45, which respondent had paid in November, 1923, plus the $3,028.24 interest which respondent had paid on that sum, was refunded.

This suit was filed in the Court of Claims on January 9, 1929. That court gave judgment for respondent in the sum of $19,995.44, with interest from the date of payment. The opinion of the court, by Littleton, J., took the view that a timely claim for refund, though in general terms, gives the commissioner "jurisdiction" to refund an overpayment and stops the running of the statute of limitations, and that the general claim may be amended to state a specific ground at any time before the commissioner makes his decision. Williams, J., dissented, and Whaley, J., did not sit.

6 SPECIFICATION OF ERRORS

1. The Court of Claims erred in holding that an amended claim for refund, filed after the expiration of the statutory period for filing claims for refund, was a sufficient compliance with the statute to permit maintenance of a suit for the recovery of a tax, even though the original claim for refund specified no grounds for the allowance of the claim.

2. The Court of Claims erred in giving judgment for respondent.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with decisions of the Circuit Court of Appeals for the Second Circuit. In Art Metal Construction Co. v. United States, 47 F. (2d) 558, the taxpayer filed within the statutory period a general claim for refund of its 1918 income and excess-profits taxes, which specified no particular grounds. After the time for filing claims had expired and before the commissioner acted on the original claim, the taxpayer filed a brief with the commissioner requesting special assessment of its 1918 taxes under section 328 of the revenue act of 1918, c. 18, 40 Stat. 1057, 1093. The court expressly assumed that the brief was an adequate claim for refund if filed in time. The commissioner determined that there had been an overassessment for 1918 because the taxpayer was entitled to special assessment for that year, but refused to refund the overpayment on the ground that the claim for refund had been filed too late. On grounds closely similar to those advanced by the court below in the present case, the District
7 Court had permitted recovery of the tax. (35 F. (2d) 379 (W. D. N. Y.) The Circuit Court of Appeals for the Second Circuit reversed, holding that the original claim for refund was no claim at all and that the later claim was too late. The court said that no action of the commissioner [in considering the claim] could toll the statute of limitations once the time had run. Thus the case is not distinguishable from the present one on the facts. This court denied certiorari. (283 U. S. 863.)

On similar facts the Circuit Court of Appeals for the Second Circuit in Zeller v. United States, 46 F. (2d) 1023, reversed a judgment of the District Court, 35 F. (2d) 870 (W. D. N. Y.), on the authority of the Art Metal case. This court denied certiorari. (283 U. S. 863.)

Two recent cases in the District Courts have applied the rule of the Art Metal case to similar facts. Marble Chair Co. v. United States, decided February 1, 1932 (N. D. Ohio), 1932 Prentice-Hall Federal Tax Service, p. 791; Elbee Chocolate Co. v. United States, decided May 6, 1932 (E. D. N. Y.), 1932 Prentice-Hall Federal Tax Service, p. 1469. See also Bemis Bros. Bag Co. v. United States, 56 F. (2d) 407 (E. D. Mo.)

The decision of the court below also conflicts in principle with a number of decisions holding that where a claim for refund is rejected, suit may not be maintained on a ground not specified in the rejected claim because of the filing, after the running of the statute of limitations, of an amendment to the original claim. Solomon *v.*
United States, 57 F. (2d) 150 (C. C. A. 2d); Jonesboro Gro-
8 cery Co. v. United States, 66 C. Cls. 320, certiorari denied;
280 U. S. 562; Mutual Life Ins. Co. v. United States, 49 F. (2d) 662 (C. Cls.), certiorari denied, 284 U. S. 628: Sugar Land Ry. Co. v. United States, 71 C. Cls. 628; National Cattle Loan Co. v. United States, decided December 30, 1931 (E. D. Ill.), 1932 Prentice-Hall Federal Tax Service, p. 1259. The question in these cases was argued to this Court in United States v. Swift & Co., 282 U. S. 468, and in Leach v. Nichols, 285 U. S. 165, but was expressly left open by the opinion of the court in each case.

Further confusion is added by decisions to the effect that defective claims for refund (as distinguished from general claims which are nullities) may be amended after the running of the period of limitations so as to provide a basis for suit. McKesson & Robbins, Inc., v. Edwards, Collector, 57 F. (2d) 147 (C. C. A. 2d); Swift & Co. v. United States, 67 C. Cls. 322. See also Prentiss & Co. v. United States, 57 F. (2d) 676 (C. C. A. 2d).

In two cases decided by the Court of Claims after the instant decision, the court below held that a general claim for refund gives the commissioner "jurisdiction" to refund an overpayment of taxes or interest thereon, and that suit may be maintained where he refuses to do so even though the general claim had never been
amended, if the commissioner was in fact acquainted with the
9 grounds upon which refund was sought. Lancaster Cotton
Mills v. United States, No. J–596, decided May 31, 1932; Memphis Cotton Oil Co. v. United States, No. L–173, decided May 31, 1932. In the latter decision the court expressly recognized the conflict with the decision of the Circuit Court of Appeals for the Second Circuit in Art Metal Construction Co. v. United States, supra, 47 F. (2d) 558. The Department of Justice is now considering whether to file petitions for certiorari in the Lancaster Cotton Mills and Memphis Cotton Oil Co. cases, supra, and if such petitions are filed they will refer to the present case, and we respectfully suggest that the court consider them together.

2. The decision of the court below is wrong. No suit could have been maintained on the basis of the general claim for refund of Feb-

ruary 27, 1923. United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269. This court there said that (p. 272)—

"the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded."

As Judge Learned Hand said in the Art Metal case, supra, the general claim "was no claim at all." (47 F. (2d) 558, 559.) Hence the filing of the general claim did not, as the court below said it did, toll the statute of limitations.

3. The question presented is one of current importance. The
10 provisions of R. S. 3226 and 3228, supra, are before the courts in an increasing number of cases. The question is a live one to-day, as shown by the number of recent cases cited in this petition. The question is one which may be involved in any suit to recover internal revenue taxes, and we are informed by the Treasury Department that the question whether a claim for refund may be amended after the running of the statute of limitations arises in thousands of cases. The instant decision and the recent decisions of the Circuit Court of Appeals for the Second Circuit, which have been cited supra, have produced great confusion with regard to existing claims, as under the decision of the court below any claim, however old and however general, may now be amended, if it has not yet been passed on by the commissioner, by filing a claim stating new grounds; and suit may then be brought thereon. Without an authoritative decision by this court the Treasury Department is unable to determine the rule applicable to these cases.

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

JUNE, 1932.

11 In the Court of Claims

No. K-13

FACTORS AND FINANCE CO., INC.

v.

THE UNITED STATES

I. *Petition*

Filed January 9, 1929

TO THE HONORABLE JUDGES OF THE COURT OF CLAIMS:

Your petitioner, Factors and Finance Co., Inc., respectfully shows to this honorable court:

I

That at all times hereinafter mentioned your petitioner was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Rhode Island. That up to and about the year 1920 your petitioner's corporate name was Stillwater Worsted Company, Incorporated, until, at such time, to wit, about the year 1920, your petitioner, by due process of law, caused its name to be changed to Factors and Finance Company, Incorporated, from which time said last aforementioned name has been, and still is, the corporate name of your petitioner. That at all times hereinafter mentioned and up to or about the year 1920 the principal place of business of your petitioner was at Harrisville, Rhode Island, and that from and after about the year 1920 the principal place of business of your petitioner was, and still is, in the borough of Manhattan, city, county, and State of New York. Your petitioner presents this, its petition and claim, in its own right as such corporation, and against the United States.

12 II

That at all times hereinafter mentioned your petitioner was engaged in the manufacturing and sale of worsted textile fabrics.

III

That on or about June 15, 1918, pursuant to the provisions of the revenue act of 1917, your petitioner duly filed its income and excess-profits tax return for the calendar year ending December 31, 1917, and, in accordance with said act, paid, on or about the 15th day of June, 1918, to the collector of internal revenue the tax shown by the said return, to wit, the sum of $177,338.72, which amount was the original assessment against your petitioner. That thereafter, and in or about the month of May, 1920, there was further assessed against your petitioner, in connection with the said return so filed, and as additional tax for the calendar year 1917, under the said act above referred to, the sum of $267.32, which sum was duly paid to the collector of internal revenue by your petitioner.

IV

That thereafter and in or about the month of August, 1920, there was further assessed against your petitioner, in connection with the said return so filed, and as further additional tax for the calendar year 1917, under the said act above referred to, the sum of $25,321.91; that your petitioner thereupon duly paid on account thereof the sum of $9,388.57, thus leaving an alleged balance due by your petitioner thereon in the sum of $15,933.34; that thereafter and in or about the month of November, 1923, there was duly granted, issued and

13 allowed to your petitioner, as a credit against its said taxes for the year 1917, by the Commissioner of Internal Revenue,

a certificate of overassessment in the sum of $3,293.89; and that thereafter and in or about the month of November, 1923, your petitioner duly paid to the collector of internal revenue the said balance of taxes alleged to be due by your petitioner, in the sum of $12,639.45, together with accrued interest thereon in the sum of $3,028.24. That by virtue of the facts above stated, your petitioner duly paid to the collector of internal revenue for its income and excess-profits taxes for the calendar year 1917 the aggregate sum of $199,634.06, assessed against your petitioner as above set forth, together with accrued interest in the amount of $3,028.24, all of which amount, as your petitioner is informed and verily believes, was turned over by the said collector and deposited into the Treasury of the United States, as in the usual course of his official business.

V

That section 210 of the said revenue act of 1917 provides as follows:

"That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received
14 by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

"For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used."

VI

That by reason of the facts and circumstances surrounding the creation, continuance, and operations of your petitioner, and by reason of the abnormalties existing with respect thereto throughout the year 1917, it was, under the said provisions of section 210, impossible for the Secretary of the Treasury satisfactorily to determine the invested capital of your petitioner, and your petitioner was accordingly entitled to have its said taxes for the said year 1917

estimated, calculated, and assessed under and pursuant to the provisions of said section 210, and that as so calculated your petitioner's said total income and excess-profits taxes for the year 1917 would not, and should not, have been in excess of the sum of $166,999.17.

VII

That thereafter, and within the time prescribed by law therefor, on or about the 27th day of February, 1923, your petitioner
15 duly filed with the collector of internal revenue a claim for refund in the sum of $177,606.04, a copy of which is annexed hereto, marked "Exhibit A," and made a part hereof, which said claim for refund was duly executed by your petitioner prior to so being filed.

VIII

That thereafter, on or about the 17th day of July, 1925, and prior to any action being taken or determination being made by the Commissioner of Internal Revenue upon said claim for refund, filed as set forth in Paragraph VII herein, your petitioner duly filed with the collector of internal revenue an amended claim for refund, in amplification of the said refund claim so first filed, a copy of which is annexed hereto, marked "Exhibit B," and made a part hereof, which said amended claim for refund was duly executed by your petitioner prior to so being filed. That all of the facts and matters set forth in the said amended claim for refund immediately herein above referred to, were true and are herewith referred to and made a part of this petition, as though herein specifically and in detail incorporated.

IX

That the said claim for refund and amended claim for refund as above referred to were duly filed prior to any determination made by the Secretary of the Treasury with respect to the rights of your petitioner to have its said income and excess-profits taxes correctly calculated, and more particularly with respect to the provisions contained in the said section 210 of the revenue act of 1917.

16 X

That thereafter the said claim for refund, as originally filed and as so amended, was duly considered by the Commissioner of Internal Revenue, and subsequently thereto the said Commissioner of Internal Revenue notified your petitioner of the result of his determination thereon by official letter dated January 13, 1927, a copy of which is annexed hereto, marked "Exhibit C," and made a part hereof.

XI

That the aforementioned January 13, 1927, letter from the Commissioner of Internal Revenue determined the correct income and excess-profits taxes of your petitioner for the year 1917 to be in the amount of $166,999.17, which was $32,634.89 less than the actual taxes theretofore assessed and paid, as above set forth, by your petitioner for the said year. The Commissioner of Internal Revenue further indicated, then and there, that the overassessment against your petitioner for the year 1917 was in the amount of $32,634.89.

XII

That, by virtue of the facts above set forth, your petitioner was entitled to a refund in the sum of $32,634.89, together with accrued interest thereon, which sum should have been returned and paid to your petitioner herein, but of which sum only the sum of $12,639.45, plus accrued interest thereon, was paid to your petitioner, leaving, by reason of the facts above set forth, the sum of $19,995.44, together with accrued interest thereon, due to your petitioner, no part of which has since been paid.

17 XIII

Your petitioner is informed, advised and believes, and therefore alleges that on or about April 23, 1927, the commissioner rejected your petitioner's claim for refund in the amount of $19,995.44, together with interest thereon, by signing, on that day, the schedule rejecting such claim.

XIV

Your petitioner avers that there is justly due and owing to it from the United States, on account of the matters herein set forth, the sum of $19,995.44, together with accrued interest thereon, after deducting all just set-offs or demands on the part of the United States.

XV

Claimant avers that it is, and always has been, the sole owner of the claim hereinbefore referred to, and has not assigned or transferred the whole or any part thereof or interest therein, and that it has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the said Government, and it believes the facts as stated herein to be true, and that it is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets.

18 Wherefore petitioner prays judgment against the United States in the sum of $19,995.44, with interest thereon.

FACTORS AND FINANCE CO., INC.,
By (Signed) WM. I. SPIEGELBERG,
President.
[CORPORATE SEAL.]

J. GILMER KORNER, JR.,
404 Transportation Building, Washington, D. C.,
Attorney of Record.

SAMUEL M. FISHER,
Of Counsel.

JOSEPH J. KLEIN,
Of Counsel.

[*Duly sworn to by William I. Spiegelberg; jurat omitted in printing.*]

19 *Exhibit A to petition*

[Claim executed on Treasury Dept. Form 843]

CLAIM FOR

ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

Stillwater Worsted Company, Inc., Harrisville, R. I.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statements are true and complete.

	Period	Year
	From: Jan. 1	1917
	To: Dec. 31	1917
1. Business in which engaged: Manufacturing worsted goods.		
2. Character of assessment or tax: Income and excess-profits tax.		
3. Amount of assessment or stamps purchased		$177,606.04
4. Reduction of tax liability requested (income and profits tax)		$177,606.04
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$177,606.04
7. Dates of payment (see collector's receipts or indorsements of canceled checks): June 15, 1918–June 30, 1920. (If statement cover income-tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed: Providence, R. I.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked; period from ____ to____		$

20 Deponent verily believes that this application should be allowed for the following reasons:

Claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save taxpayer's rights under the pertinent statutes governing abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due.

21 *Exhibit B to petition*

[Claim executed on Treasury Dept. Form 843]

CLAIM FOR

ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
X REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OF EXCESS

STATE OF NEW YORK,
County of New York, ss:

Factors and Finance Co., Inc. (formerly Stillwater Worsted Co., Inc.), 257 Fourth Avenue, New York, N. Y.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

	Period	Year
	From: Jan. 1	1917
	To: Dec. 31	1917
1. Business in which engaged: Manufacturing worsted goods.		
2. Character of assessment or tax: Income and profits taxes.		
3. Amount of assessment or stamps purchased		$177,606.04
4. Reduction of tax liability requested (income and profits tax)		$177,606.04
5. Amount to be abated		$
6. Amount to be refunded or such greater amount as is legally refundable)		$177,606.04
7. Dates of payment (see collector's receipts or indorsements of canceled check): statutory due dates. (If statement covers income tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed: Providence, R. I., or Hartford, Conn.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked: period from to		$

22 Deponent verily believes that this application should be allowed for the following reasons:

Before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim, setting forth the details in the matter.

Taxpayer hereby makes application for assessment under the provision of section 210 of the revenue act of 1917 for the reasons set

forth in the attached sheets, and respectfully requests the tax adjustments shown thereon.

Statement attached to the 1917 refund claim of taxes of Factors and Finance Co. Inc. (ormerly Stillwater Worsted Co., Inc.), 257 Fourth Ave., New York, N. Y.

REASONS:

(A) Taxpayer respectfully states that, if the tax is determined without the benefit of section 210, owing to certain abnormal conditions, it will work exceptional hardship upon the taxpayer, evidenced by the gross disproportion between the tax computed without the benefit of this section, and the tax computed by reference to the representative corporations specified in section 210. The abnormalities claimed are clearly indicated by the following percentages, which show a 104.8% return on investment, and a profits tax payment of 48.4% of its net income:

(a) Invested capital	$369,954.27
(b) Net taxable income	387,706.57
(c) Excess and war profits taxes	187,629.43
(d) Income taxes	12,004.63
(e) Total tax	199,634.06
(f) % which (b) is of (a)	104.8
(g) % which (c) is of (a)	50.7
(h) % which (c) is of (b)	48.4

FACTS:

(B) The reasons set forth in (A) above are predicated on the following facts, which compare taxpayer's 1917 tax data with that of representative concerns:

23 *Statement attached to the 1917 refund claim of taxes of Factors and Finance Company, Inc. (formerly Stillwater Worsted Company, Inc.), 257 Fourth Avenue, New York, N. Y.*

	(a) Invested capital	(b) Net taxable income	(c) Excess and war-profits taxes	(d) Total taxes	% which (b) is of (a)	% which (c) is of (a)	% which (c) is of (b)
Taxpayer	$369,954.27	$387,706.57	$187,629.43	$199,634.06	104.8	50.7	48.4
Montrose Woolen Co.*			136,066.34	144,335.76			49.6
Montrose Woolen Co.†	237,562.94	274,258.06	88,899.73	99,999.15	115.4	37.4	32.4
Merion Worsted Mills					28.6		20.7
Empire Worsted Mills					30.0		23.0
American Association of Woolen and Worsted Mfrs. (compilation average)					43.1		27.9

*Before being granted relief under section 210.
†After being granted relief under section 210.

DESCRIPTION OF BUSINESS:

(C) The business of the Stillwater Worsted Co., Inc., was the manufacture and sale of men's worsted merchandise in the piece. The operations of this concern, during 1917, began with the purchase of yarn and proceeded thence with weaving and the various other processes required for the manufacture thereof into finished worsted goods in the piece.

INVESTED CAPITAL, ETC.:

(D) The Stillwater Worsted Company, Inc., ceased business operations at the end of 1911, and liquidated all of its assets and liabilities and retired all of its stock with the exception of eight (8) shares of common stock which were left for the purpose of keeping the corporation alive as an entity. The shell of the corporation continued thus though the years 1912, 1913, and 1914, the company during that entire period being quiescent and doing no business, of any nature, whatever. On January 1, 1915, the corporation again started operations, obtaining new capital, and continued uninterruptedly thereafter until December, 1919.

The annual net income and invested capital of the company, as determined by the department, is as follows:

24 *Statement attached to the 1917 refund claim of taxes of Factors and Finance Company, Inc. (formerly Stillwater Worsted Company, Inc.), 257 Fourth Avenue, New York, N. Y.*

Year	Net income	Invested capital
1911	$9,752.88	$66,673.72
1912	None.	800.00
1913	None.	800.00
1914	None.	800.00
1915	73,289.75	65,811.51
1916	187,330.36	171,009.79
1917	387,706.57	369,954.27

(E) The company did not have any governmental cost-plus contracts.

25 *Exhibit C to petition*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Jan. 13, 1927.

Address reply to Commissioner of Internal Revenue and refer to IT:E:SM SEW-30340.

Klein, Hinds, and Fink,
19 West 44th Street, New York, New York.

SIRS: There is enclosed a carbon copy of a letter of this date addressed to the taxpayer whose name and address are given below. This copy is furnished in accordance with the authority conferred upon you by the taxpayer to whom the original letter has been mailed.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By (Signed) LESLIE GILLIS,
Acting Chief of Section.

Enclosure: Copy of letter.

Name and address of taxpayer: Stillwater Worsted Company, Harrisville, Rhode Island.

(1154M.)

26 JAN. 13, 1927.

IT:E:SM SEW-30340.

Stillwater Worsted Company,
Harrisville, Rhode Island.

SIRS: Reference is made to your protest dated May 8, 1926, against the denial of your application for assessment of your profits tax for the year 1917 under the provisions of section 210 of the revenue act of 1917 as set forth in bureau letter dated April 30, 1926.

After a careful review of your protest and of all the evidence submitted in support of your contentions in conference held in this office on June 22, 1926, you are advised that the bureau holds that your profits tax for the year 1917 should be computed under the above-mentioned provisions.

The result of the audit thereunder is as follows:

Net income as corrected		$387,706.57
Profits tax (section 210)		152,911.47
Net income	$387,706.57	
Less: Profits tax	152,911.47	
Balance subject to income tax	$234,795.10	
Income tax at 2%		4,695.90
Income tax at 4%		9,391.80
Total tax liability		166,999.17
Previously assessed:		
Original, account #8751475	$177,338.72	
Additional, May, 1920, page 19, line 5	267.32	
Additional, August, 1920, page 10, line 4	25,321.91	
Total assessed	202,927.95	
27 Less:		
Overassessment October 1, 1923 (schedule #7222)	3,293.89	
		199,634.06
Overassessment indicated		32,634.89
Amount outlawed		19,995.44
Overassessment allowable		12,639.45

In accordance with the above conclusions your two claims for refund in the amounts of $177,606.04, each, aggregating $355,212.08, will be rejected for $342,572.63.

The collector of internal revenue for your district will be officially notified of the rejection at the expiration of thirty days from the date of this letter.

The overassessment shown above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district and will be applied by that official in accordance with section 284 (a) of the revenue act of 1926.

With reference to the amount of the overassessment shown above which is outlawed, you are advised that your claim for refund filed February 27, 1923, or within the period of time allowed for the filing of claims, does not outline or specify an application for relief under the provisions of section 210 of the revenue act of 1917,

and your claim for refund filed July 18, 1925, amplifying the former claim and outlining an application under section 210, was not filed within the statutory period.

The refunding of any original tax paid is, therefore, outlawed, as is also the additional tax in the amount of $267.32 assessed on the May, 1920, list, and that part of the additional tax assessed on the August, 1920, list, $25,321.91, not abated in the amount of $9,388.57.

28 Your claim for the abatement of $15,933.34 filed October 2, 1920, has been allowed for $3,293.89, leaving an amount to be refunded represented by the balance of the unallowed portion of the claim for abatement in the amount of $12,639.45 ($15,933.34 less $3,293.89) paid in 1923.

A copy of this communication is being furnished your authorized representatives, Klein, Hinds and Fink, New York, New York.

Respectfully,

(Signed) C. R. NASH,
Assistant to the Commissioner.

TAP–1.

29 II. *General traverse*

Filed February 18, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

III. *Argument and submission of case*

On October 16, 1931, this case was argued and submitted on merits by Mr. J. Gilmer Korner, jr., for plaintiff, and by Mr. George H. Foster, for defendant.

30 IV. *Special findings of fact, conclusion of law, and opinion of the court by Littleton, J.*

Filed March 7, 1932

Mr. J. Gilmer Korner, jr., for the plaintiff.

Mr. Joseph J. Klein, Mr. Myron A. Finke, and Mr. Samuel M. Fisher were on the brief.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

Mr. Charles F. Kincheloe was on the brief.

Messrs. Ivins, Brewster, and Phillips, amici curiae.

This suit is for the recovery of $19,995.44, with interest, representing overpayment of income and profits tax for 1917. There is no

dispute as to the amount of the overpayment. The Commissioner of Internal Revenue in his final audit and determination decided that plaintiff had overpaid its 1917 tax in the amount of $32,634.89. He refunded $12,639.45 tax and $3,028.24 interest paid on November 22, 1923, within four years prior to the determination of the overpayment on or about January 13, 1927. He declined to refund the balance of the overpayment, amounting to $19,995.44, on the ground that no sufficient timely claim for refund had been filed. The issue is whether, in the circumstances of this case, a claim for refund for a particular taxable year timely filed by plaintiff, but which claim did not specify any particular item or items causing an overpayment and did not contain any statement of facts showing an overpayment, could be amplified and amended before the commissioner had considered and acted upon it so as to specify the ground of the overpayment for the same years and the facts to sustain it.

SPECIAL FINDINGS OF FACT

1. At all times hereinafter mentioned the plaintiff was and still is a Rhode Island corporation engaged in the manufacture and sale of worsted textile fabrics, with principal place of business at Harrisville. Its corporate name was Stillwater Worsted Co., Inc., until 1920, when its name was changed to Factors and Finance Co., Inc.

2. June 15, 1918, plaintiff duly filed its income and profits tax returns for the calendar years 1917 and on or about that date paid to the collector the tax shown thereon of $177,338.72. Thereafter, in May, 1920, the commissioner assessed an additional tax of $267.32, which was paid June 29, 1920. In August, 1920, the commissioner made a further assessment of an additional tax in the amount
31 of $25,327.91 for 1917. October 4, 1920, plaintiff paid $9,388.57 thereof, leaving a balance alleged to be due of $15,933.34. On October 1, 1920, plaintiff executed a claim for abatement of $15,933.34 on Treasury Form 47, which was filed October 2, 1920. This claim was made and filed pursuant to advice received by the taxpayer from the officials of the Bureau of Internal Revenue on September 20, 1920.

3. Thereafter an examination of the affairs of the taxpayer in connection with its claim for abatement was ordered by the commissioner May 6, 1921, and pursuant thereto an examination was made by an agent of the Bureau of Internal Revenue between May 18 and June 7, 1922. A report of this investigation was made to the Commissioner of Internal Revenue August 4, 1922, and was received by him August 22, 1922. This examination and report was made in connection with plaintiff's claim for abatement theretofore filed.

4. January 16, 1923, the commissioner advised the plaintiff by letter that an examination of its claim for abatement had been made and that, pursuant thereto, certain adjustments had been made resulting in certain overassessments for 1916 and 1917. This letter is

in evidence as Exhibit H and is made a part hereof by reference. On February 9, 1923, plaintiff filed with the commissioner a brief setting forth exceptions to the proposed overassessments for 1916 and 1917.

5. February 27, 1923, before the Commissioner of Internal Revenue had made and notified the plaintiff of his final determination in connection with his audit of plaintiff's tax liability for 1917 and of his final action on the claim for abatement, plaintiff filed with the collector of internal revenue of Rhode Island a claim for refund of $177,606.04 for 1917. This claim is attached to the petition as Exhibit A and is made a part hereof by reference. This claim, filed on Treasury Form 843, recited the amount claimed to be refundable and that said amount had theretofore been paid on June 15, 1918, and June 30, 1920. The claim was under oath and set forth that it was filed for the purpose of enabling the commissioner to refund to the taxpayer any amount of taxes paid by it on account of the income and profits taxes for 1917 in excess of its true tax liability for that year, and that the true tax liability had not been finally determined by the commissioner. The claim also stated that "Claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save the taxpayer's right under the pertinent statutes covering abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due." The claim was forwarded by the collector to the commissioner and was received by the latter March 20, 1923.

Shortly prior to the date of receipt of the claim for refund by the commissioner on March 20, 1923, he had considered, audited, and reviewed the claim for abatement filed October 2, 1920, and had made certain adjustments in the tax liability for 1917 resulting in the determination of an overassessment of $3,293.89. These determinations and adjustments were in connection with the claim in abatement and were predicated upon the report of the internal revenue agent, made in connection with the abatement claim and
32 upon statements submitted by the taxpayer in support of its claim for abatement of $15,933.34. As a result of this consideration, audit, and review, the commissioner prepared a certificate of overassessment which was forwarded to the plaintiff some time during November, 1923.

The commissioner in his audit and consideration of plaintiff's claim for abatment, as aforesaid, did not consider or act upon the claim for refund filed February 27, 1923.

6. Upon the receipt by plaintiff of the certificate of overassessment from the commissioner, the plaintiff on November 22, 1923, paid to the collector of internal revenue the balance of the taxes alleged to be due by the certificate of overassessment in the amount of $12,639.45, representing the difference between the amount claimed

in the claim for abatement and the amount shown as the overassessment in the certificate of overassessment. Plaintiff also paid interest of $3,028.24. The total tax paid by plaintiff for the calendar year 1917, representing the original and additional assessments, amounted to $199,634.06, together with accrued interest of $3,028.24. The true and correct tax liability of the plaintiff on account of the income and excess profits tax for the calendar year 1917, under and pursuant to the pertinent provisions of the revenue act of 1917, was $166,999.17, being $32,634.89 less than the amount paid by the plaintiff, as aforesaid.

7. The Commissioner of Internal Revenue took no action with reference to the consideration or determination prior to July 17, 1925, relative to the claim for refund filed February 27, 1923, or as to its allowance or its rejection.

On July 17, 1925, and prior to any action being taken upon, or consideration or determination given to, the claim filed February 27, 1923, plaintiff duly filed with the collector an amendment to its claim for refund of February 27, 1923, in amplification thereof. In this amendment and amplification plaintiff stated, and specified, that its true tax liability should be determined pursuant to the provisions of section 210 of the revenue act of 1917, which section provided that if the invested capital could not be satisfactorily determined the profits tax should be computed in a certain manner. This claim is attached to the petition as Exhibit B and is in evidence as Exhibit L, and is made a part of this finding by reference. It asks that its claim theretofore filed February 27, 1923, be allowed in the amount therein claimed. The amendment and amplification calling the attention of the commissioner to the pertinent provisions of existing law applicable to the plaintiff's claim for refund, and under which it was entitled to have its true tax liability computed and determined, likewise contained a statement of facts and certain data compiled from the income and profits tax returns for 1917 theretofore filed by the taxpayer. The amendment also contained the statement that "Before the tolling of the statue of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04," and this document is merely the amplification of said claim, setting forth the details in the matter. Taxpayer hereby makes application for assessment under the provision of section 210, of the revenue act
33 of 1917, for the reasons set forth in the attached sheets, and respectfully requests the tax adjustments shown thereon."

Thereafter the commissioner entered upon a consideration of the claim for refund and in connection therewith considered the amendment or amplification thereof filed July 17, 1925, and on April 30, 1926, wrote plaintiff a letter that its claim for refund of $177,606.04 for 1917 would be rejected because of insufficiency of proof. This letter is in evidence as Exhibit M and is made a part hereof by reference. To this communication the plaintiff made reply to the com-

missioner on May 8, 1926, in which it called the commissioner's attention to the statement of facts and data submitted with the amendment of the original refund claim. This reply is in evidence as Exhibit N and is made a part hereof by reference. Thereafter, on May 14, 1926, the commissioner, pursuant to the aforementioned communication from the plaintiff, advised it that in accordance with its request a conference upon the claim had been arranged and would be held in his office on June 22, 1926, and that "All of the evidence as to law and facts, which you desire to have considered by the bureau in the final determination of the abnormality or abnormalities alleged, must therefore be submitted at once or as far in advance as possible of the date above fixed, in order that the fullest consideration may be given thereto." This letter is in evidence as Exhibit O and is made a part hereof by reference. Thereafter, on June 22, 1926, a hearing was held in the office of the Commissioner of Internal Revenue at which hearing plaintiff appeared and submitted evidence and data in support of its claim for refund.

8. Thereupon the Commissioner of Internal Revenue considered plaintiff's original and amended claims for refund and the evidence submitted in support thereof and held that the profits tax for 1917 should be computed under the provisions of section 210 of the revenue act of 1917, as claimed. Accordingly, he determined that the true tax liability of plaintiff under the provisions of the revenue act of 1917 for the calendar year 1917 was $166,999.17 instead of $202,727.95, as theretofore determined and assessed by him and instead of $199,634.06 as theretofore collected. He therefore determined that plaintiff had paid as taxes $32,634.89 in excess of the true amount of tax due for 1917. Accordingly, on January 13, 1927, the Commissioner of Internal Revenue advised plaintiff by letter that "After a careful review of your protest and of all the evidence submitted in support of your contentions in a conference held in this office on June 22, 1926, you are advised that the bureau holds that your profits tax for the year 1917 should be computed under the above-mentioned provisions [sec. 210, revenue act of 1917]," and computed an overpayment of $32,634.89. In this letter the commissioner further advised plaintiff that $19,995.44 of the determined overassessment and overpayment was barred by the statute of limitation on the ground that "your claim for refund filed February 27, 1923, or within the period of time allowed for the filing of claims, does not outline or specify an application for relief under the provisions of section 210 of the revenue act of 1917, and your claim for refund filed July 18 [17], 1925, amplifying the former claim and outlining an application under section 210 was not filed with-
34 in the statutory period." This letter is in evidence as Exhibit P and is made a part hereof by reference.

Thereafter the commissioner, on April 8, 1927, executed and mailed to the plaintiff a "Certificate of overassessment" on Treasury Form No. 7776–C, setting forth the true tax to be $166,999.17 and further setting forth that the payments made by plaintiff in excess of its

true tax liability were in the amount of $32,634.89. This document is in evidence as Exhibit R and is made a part hereof by reference.

9. By reason of the provisions of section 210 of the revenue act of 1917, plaintiff was entitled to have its profits tax for 1917 determined and computed under and in accordance with that section.

10. On June 21, 1927, the commissioner refunded to the plaintiff $12,639.45, together with $3,028.24, interest which had been paid thereon. The commissioner declined and refused to refund the balance, i. e., $19,995.44, of the total amount of $32,634.89 found and determined by him to have been overpaid by the plaintiff for 1917.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $19,995.44, with interest as provided by law.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of nineteen thousand nine hundred ninety-five dollars and forty-four cents, with interest at the rate of six per cent per annum from the date of payment thereof to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177 of the Judicial Code, as amended, being a part of the revenue act of May, 1928.

OPINION

LITTLETON, Judge, delivered the opinion of the court:

The question in this case is whether the original claim for refund could be amended after the expiration of five years from the date when the return for 1917 was due. The defendant agrees that if the claim of February 27, 1923, could be amended before it was decided by the commissioner, the plaintiff is entitled to recover.

The refund claim of February 27, 1923, was timely filed. At that time the audit of the plaintiff's 1917 return and the matter of its tax liability were being considered by the Commissioner of Internal Revenue, and he had not made a final decision with reference thereto. Plaintiff could not, of course, know what the result of the audit of the commissioner would be, and the time within which a claim for refund could be legally filed was about to expire. Accordingly it duly filed the claim of February 27, 1923, duly verified, on the form prescribed by the Bureau of Internal Revenue, asking a refund of $177,606.04. This claim did not state any particular item or items as a ground for refund nor did it set forth any facts which would show an overpayment, but it pointed out that the tax liability for 1917 had not been decided by the commissioner and that the claim was being filed to protect the taxpayer's rights under the per-
35 tinent statutes governing refunds and to permit the commissioner to refund any tax paid in excess of that found to be due. At the time this claim was filed there was pending before the com-

missioner a claim for abatement of an additional tax assessed in August, 1920, which claim had been made the subject of a field investigation and audit of taxpayer's books and records. This abatement claim was finally allowed in part and rejected in part by the commissioner, and a certificate of overassessment showing the abatement of $3,293.89 was forwarded to plaintiff in November, 1923. The commissioner did not consider or act upon plaintiff's claim for refund in connection with his consideration of the abatement claim.

On July 17, 1925, and before the commissioner had taken any action with reference to the refund claim of February 27, 1923, plaintiff prepared on the standard Treasury form and duly filed a claim for refund as an amendment and amplification of the earlier claim. The amended claim set forth specifically that the refund should be granted for the reason that the profits tax should be computed under the provisions of section 210 of the revenue act of 1917, and requested the commissioner to make such computation. Section 210 provided that if the invested capital could not be satisfactorily determined the profits tax "shall" be determined and computed in a certain manner. The commissioner took up the consideration of these claims. Evidence in support of the claims was furnished by plaintiff, and hearings were held in the commissioner's office after a consideration of which the commissioner held that the profits tax should be computed under section 210 as claimed by plaintiff, and, as a result of such computation, determined the overpayment, a part of which is here in question. In these circumstances we are of opinion that the claim of July 17, 1925, was a proper amendment and amplification of the original claim of February 27, 1923.

The statutory provisions relating to refund claims for overpayment of taxes fall into two classes: First, section 284 (a) and (b) (1) of the revenue act of 1926, and sections 3220 and 3228 (a) of the Revised Statutes, as amended, provide that the Commissioner of Internal Revenue may not make a refund of overpaid taxes, after a specified period, unless a claim therefor be filed by the taxpayer. So far as a refund by the Commissioner is concerned, these provisions do not require the statement in the claim of the facts or theory upon which the claim is based. He may allow such a claim upon any facts of which he may have knowledge or which he may himself obtain. Second, section 3226 of the Revised Statutes, as amended, provides that before suit can be maintained on a claim for refund a claim must be filed in accordance with the regulations. Reg. 69, art. 1304, which is in substance the same as all previous regulations under the income tax acts provides that "All facts relied upon in support of the claim should be set forth in detail under oath."

The difference in the above statutory provisions is (a) to authorize the commissioner to make a refund of overpaid taxes, he need only have a "claim" therefor before him. No detailed facts need be stated by the taxpayer to enable the commissioner to allow the claim and make a refund. (b) But before the taxpayer can go into court

to review the commissioner's treatment of his case, the facts upon which the claim is based must be brought to the attention of
36 the commissioner, and the commissioner thus accorded the opportunity to consider the contentions that the court will have before it. The purpose of this last requirement is to spare the parties and the courts the burden of litigation in respect to the tax. The first purpose under the statutes of filing a claim for refund is to give the commissioner jurisdiction over the matter. If the commissioner is satisfied that the tax has been overpaid he could make a refund under section 284 (a) and (b) (1) if a mere informal and defective claim or a general "blanket" claim were timely filed with him in which no facts or grounds were stated. Bonwit Teller & Co. v. United States, 283 U. S. 258. He could not, however, make the refund after the period indicated by the statute unless such a claim were filed, even although he had audited the return and found an unquestioned overpayment. Thus, the prime purpose of a refund claim is to give the commissioner jurisdiction over the matter. He may then of his own accord give the taxpayer any relief which he thinks proper.

However, if the taxpayer desires to protect his right to a judicial review of the commissioner's action, if he should not determine that a refund should be made, he should set forth the facts upon which he relies as entitling him to a refund. Such procedure on the part of the taxpayer is required by section 3226, R. S., and the reason for this requirement is clearly established by the decisions of Tucker v. Alexander, 275 U. S. 228; United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269; Feather River Lumber Co. v. United States, 66 C. Cls. 54.

Claims for refund are analogous in theory and purpose to processes and petitions in proceedings in courts and should, we think, be governed by the same rules of law in regard to amendments. In our opinion a timely claim for refund for a particular taxable year, although general in terms, gives the commissioner jurisdiction over the matter of any overpayment of tax for that year, stops the running of the statute of limitations, and the commissioner may, under the relief provisions of the statute or upon facts already in his possession, or upon facts furnished by the taxpayer or facts which he may obtain by his own investigation, repay to the taxpayer any overpayment which he may find in respect to the tax for that particular year. We are of the opinion that the taxpayer may, by amendment or amplification prior to action upon the claim for refund or rejection thereof by the commissioner, bring to the commissioner's attention the particular items of tax liability involved and set forth the detailed facts relied upon; and that a timely claim for refund may thus be amended prior to rejection even though a new or an original claim might be barred by the statute of limitations. Particularly is this true when at the time of filing the refund claim the commissioner had under consideration the audit of plaintiff's tax liability for the year in question in connection with which no decision had been made and the amount of tax which the plain-

tiff might be called upon to pay had not been determined. Until this determination had been made plaintiff did not know what the basis of the commissioner's final decision would be. The Commissioner of Internal Revenue in his letter to the plaintiff of January 13, 1927, advising it of his decision upon the claim, referred to the claim of July 17, 1925, as "amplifying the former claim."

37 The amendment of the claim for refund in this case did not set up a new cause of action. The provisions of the various revenue acts are mandatory in their provisions that the commissioner shall audit the return, determine the correct tax liability, collect any tax found to be due and refund or credit any amount which has been paid in excess of the tax properly due, but it is provided that a refund of the excess tax may not be made unless claim therefor is filed within a specified time. These provisions are similar in purpose and effect to the provisions of Title IX, revenue act of 1924, and Title X, revenue act of 1926, giving the United States Board of Tax Appeals jurisdiction to determine the deficiency or overpayment in respect of the tax upon the filing by the taxpayer within sixty days of a petition in a case where the commissioner has determined a deficiency. Upon the filing of such petition within the statutory period the board acquires jurisdiction of the tax liability for the period specified in a timely petition and may determine the correct amount of the deficiency due or the amount of any overpayment, Peerless Woolen Mills, 13 B. T. A. 1119; Peerless Woolen Mills v. Rose, 28 Fed. (2d) 661. The board has uniformly held that an incomplete or imperfect petition setting forth no grounds or facts, as required by Rule 5 of the board, may be perfected or amended after the time for filing a petition has expired. The board has also held that a taxpayer may amend his petition to restate his case with more accuracy or certainty or to correct a mistake or supply a deficiency so long as it does not thereby declare a new and different cause of action even where the time of limitation has run, and that the nature of the cause of action in general under the original petition is the determination of the correct tax for a certain period. The Peruna Co., 11 B. T. A. 1180, 1188; Marion Shainwald Sevier, 14 B. T. A. 709, 716.

The only restriction upon the power of a tribunal to allow amendments is that it can not permit a party, by amendment, to set up a new cause of action barred by limitation over which the tribunal did not acquire jurisdiction under the original process, petition, or claim. The Commissioner of Internal Revenue having jurisdiction under the claim filed February 27, 1923, to determine an overpayment, was not limited to the theory, grounds, or items of computation that might be the basis of determining it. He had the same authority to consider new contentions directed to the same end, i. e., the determination of the correct amount which had been erroneously collected, that a court would have to allow amendments to a pleading which did not bring in a new cause of action. The statute creates

a cause of action before the Commissioner of Internal Revenue for an overpayment of tax for a given year and not necessarily for each disputed item on or omitted from the return. See St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 689; Illinois Surety Co. v. United States, 215 Fed. 334, 339; Swift & Co. v. United States, 67 C. Cls. 322; 14 Op. A. G. 615. Compare Lewis *v.* Reynolds, — U. S. —, decided January 4, 1932. The taxpayer may therefore so long as his claim is pending before the commissioner, and not decided, bring to the attention of the commissioner by amendment specific items and the facts with reference thereto.

38 The defendant relies in this case upon L. O. 1116, III–1 C. B. 350, published by the Solicitor of Internal Revenue in 1924. We think that opinion is not applicable here. The solicitor held that although a claim for refund might be amended, even after rejection, before the expiration of the statutory period for filing a new claim, a claim which had been rejected could not be amended after the expiration of the statutory period. This ruling was sound. Sugar Land Railway Co. v. United States, 71 C. Cls. 628, 48 Fed. (2d) 973; Mutual Life Ins. Co. of New York v. United States, 72 C. Cls. 204, 49 Fed. (2d) 662; Edward Maxson v. United States, 72 C. Cls. 335, 50 Fed. (2d) 276. If a new claim were in order, accepting amendments to the old one would be the same as accepting a new one. If the original claim had been rejected and the time for filing a new one had expired, the commissioner would be without jurisdiction to consider an amendment unless he might reconsider and reopen his decision on the original claim.

In this case the original claim for refund was timely and, though perhaps lacking in adequacy as to details, it gave the commissioner jurisdiction and was susceptible of amplification and amendment. By the amendment filed, before the commissioner had acted, the commissioner was fully advised as to the grounds and the facts relied upon. He was not misled. The rule is settled that a taxpayer may not bring a suit in court to collect a refund of a tax unless he has put the Commissioner of Internal Revenue upon notice of the nature of his claim so that the commissioner may act intelligently on the claim with the facts before him and, thus, have an opportunity to correct errors and mistakes before making his decisions on the claim. The logic of the situation leads to the implication that if a taxpayer has put the commissioner on notice of the nature of his claim and has placed all the facts relating thereto before the commissioner prior to his consideration or action upon such claim, the commissioner then has full opportunity to correct errors and mistakes and to make a proper refund without burdening the parties and the courts with unnecessary litigation. It thus follows that when a condition precedent giving rise to the rule has been met and complied with, the reason for the rule ceases and the rule itself is no longer applicable. In Tucker v. Alexander, supra, the court said: "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for

the convenience of Government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery." Statutes must have a reasonable construction, and the language must be interpreted with reference to the subject matter and the general course of business to which they relate, and in such manner that the beneficient provisions of remedial laws may not be thwarted by nice technicalities not within the minds of the legislators. Lynch v. Alworth-Stephens Co., 267 U. S. 364, 370; Old Colony R. R. Co. v. Commissioner of Internal Revenue, — U. S. —, decided February 15, 1932. The evident object aimed at by the law was to have the proceeding for the refund of taxes actually instituted within the time limit, in order to avoid the consideration of stale claims, and not to define the manner in which
39 they should be presented to the commissioner, or to define the limits of his authority to consider and decide matters as to the correct overpayment that might be presented by an amendment to a timely claim prior to his decision thereon. The commissioner considered these claims and after hearing the plaintiff thereon, and considering the facts and information submitted by the plaintiff, determined the overpayment in question upon the grounds specified. The plaintiff is therefore entitled to recover.

Judgment will be entered in favor of plaintiff for $19,995.44, with interest as provided by law. It is so ordered.

GREEN, Judge, and BOOTH, Chief Justice, concur.
WILLIAMS, Judge, dissents.
WHALEY, Judge, took no part in the decision of this case.

40 V. *Judgment*

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $19,995.44, with interest.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of nineteen thousand nine hundred ninety-five dollars and forty-four cents ($19,995.44), with interest at the rate of six per cent per annum from the date of payment thereof to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177 of the Judicial Code, as amended, being a part of the revenue act of May, 1928.

41 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 36,838. Court of Claims. Term No. 141. The United States, petitioner, vs. Factors & Finance Company. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1932. File No. 36,838.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 10, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.
FILED
NOV 25 1932
CHARLES ELMORE CROPLEY
clerk

FILE COPY

No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES, PETITIONER

v.

FACTORS & FINANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Summary of argument	5
Argument	5
Conclusion	15
Appendix A	16
Appendix B	21
Appendix C	23

CITATIONS

Cases:

Art Metal Construction Co. v. *United States*, 47 F. (2d) 558, certiorari denied, 283 U. S. 863	9
Baltimore & Ohio S. W. R. v. *Carroll*, 280 U. S. 491	9
Bemis Bros. Bag Co. v. *United States*, 60 F. (2d) 944	10
Bonwit Teller & Co. v. *United States*, 283 U. S. 258	13, 14
Electric Power & Light Corp. v. *United States* (C. Cls.), decided November 14, 1932	11
Hart Glass Mfg. Co. v. *United States*, 73 C. Cls. 32, certiorari denied, 286 U. S. 556	7
Johnson v. *United States*, (C. Cls.), decided November 14, 1932	11
Jonesboro Grocer Co. v. *United States*, 66 C. Cls. 320, certiorari denied, 280 U. S. 562	9
Leach v. *Nichols, 285 U. S. 165*	9
Memphis Cotton Oil Co. v. *United States*, 59 F. (2d) 276, now pending on writ of certiorari, No. 308, October Term, 1932	11
Miller v. *McIntyre*, 6 Pet. 61	8
Mutual Life Ins. Co. v. *United States*, 72 C. Cls. 204, 49 F. (2d) 662, certiorari denied, 284 U. S. 628	10
Seaboard Air Line Ry. v. *Renn*, 241 U. S. 290	9
Sicard v. *Davis*, 6 Pet. 124	9
Solomon v. *United States*, 57 F. (2d) 150	9
Tucker v. *Alexander*, 275 U. S. 228	14

Cases—Continued.	Page
United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269	5, 7, 12
United States v. *Swift & Co.*, 282 U. S. 468	9
Williamsport Wire Rope Co. v. *United States*, 277 U. S. 551	13
Zeller v. *United States*, 46 F. (2d) 1023, certiorari denied, 283 U. S. 863	9
Statutes:	
Revenue Act of 1917, c. 63, Sec. 210, 40 Stat. 300, 307	16
Revenue Act of 1921, c. 136, 42 Stat. 227, 268, 314, as amended by the Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505—	
Sec. 252	17
Sec. 1316	17
Sec. 1318	18
Revenue Act of 1924, c. 234, Sec. 1014, 43 Stat. 253, 343	5
Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 116—	
Sec. 284 (U. S. C. App., Title 26, Sec. 1065)	19
Sec. 1113	5
Regulations:	
Treasury Regulations 62, Art. 1036	19

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 141

THE UNITED STATES, PETITIONER

v.

FACTORS & FINANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 21) is reported in 56 F. (2d) 902 and in 73 C. Cls. 707.

JURISDICTION

The judgment of the Court of Claims was entered March 7, 1932. (R. 16, 26.) The petition for a writ of certiorari was filed June 7, 1932, and the writ was granted October 10, 1932. (R. 26, 27.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the respondent can maintain a suit for the recovery of an overpayment of taxes based upon a general claim for refund which did not set

forth the ground on which the suit is based, this ground being raised first in an amendment to the claim for refund filed after the statutory period for presenting such claims had expired.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in Appendix A. (*Infra*, p. 16.)

STATEMENT

Respondent sued in the Court of Claims to recover an overpayment of $19,995.44 on its income and excess-profits taxes for the year 1917. The following is a summary of the facts found by the Court of Claims (R. 17–21):

Respondent filed its income and excess-profits tax return for 1917 on June 15, 1918, and paid a tax of $177,338.72 on or about that date. In August, 1920, an additional tax of $25,327.91 was assessed for 1917. In October, 1920, respondent paid $9,388.57 of this assessment and filed a claim for abatement of the balance of $15,933.34. The Commissioner of Internal Revenue ordered an investigation of respondent's affairs in connection with the claim for abatement. Following the investigation he notified respondent, in January, 1923, that it had been overassessed for the year 1917. (R. 17.)

The respondent, on February 9, 1923, filed exceptions to the proposed overassessment and on February 27, 1923, filed with the Collector of Internal

Revenue for Rhode Island a claim for refund of $177,606.04 for the year 1917. (R. 11, 12.) The claim stated that it was filed "in order to save taxpayer's rights under the pertinent statutes governing abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due." The claim for refund was received by the Commissioner on March 20, 1923. Previously he had reconsidered the claim for abatement and determined that respondent had been overassessed $3,293.89 for the year 1917. In November, 1923, a certificate of overassessment was accordingly sent to respondent reducing the unpaid 1920 assessment to $12,639.45, which amount with interest the respondent then paid. (R. 18, 19.) The February, 1923, claim for refund was neither specifically allowed nor rejected.

On July 17, 1925, respondent filed what was termed an amendment to and amplification of the previous claim, asking special assessment of the 1917 tax under Section 210 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 307, which authorized a special method of assessment where the invested capital was not satisfactorily determinable. (R. 19.)[1]

[1] The claim for special assessment was specifically based on the ground that the tax liability was so high as to work a hardship on the taxpayer, and the net income and statutory invested capital as determined by the Commissioner were not contested. (R. 12–14.)

The Commissioner took the claim for refund under consideration, and, after a hearing on June 22, 1926, concluded that the profits tax for 1917 should be computed under Section 210 of the 1917 Act. This computation indicated that respondent had been overassessed for 1917 by the sum of $32,634.89, all of which had been paid. On January 13, 1927, the Commissioner notified respondent that, of the overassessment of $32,634.89, $19,995.44 was barred from refund because the claim for refund of February 27, 1923, did not ask for a special assessment, and the claim for refund of July, 1925, which did, was not filed within the statutory period for presenting such claims. In April, 1927, a certificate of overassessment, showing the determinations of the Commissioner, was issued to respondent, and in June, 1927, the sum of $12,639.45, which had been paid within four years of the filing of the claim for special assessment, was refunded with interest. (R. 20, 21.) The Court of Claims gave judgment for the respondent. (R. 26.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Claims erred in holding that an amended claim for refund, filed after the expiration of the statutory period for filing claims for refund, was a sufficient compliance with the statute to permit maintenance of a suit for the recovery of a tax, even though the original claim for refund specified no grounds for the allowance of the claim.

2. The Court of Claims erred in giving judgment for respondent.

SUMMARY OF ARGUMENT

The Revenue Acts and the applicable provisions of the Revised Statutes require that, before suit may be maintained for the recovery of erroneously collected taxes, a claim for refund, complying with certain requisites, must be filed. Such a claim must state the facts upon which the suit is based. *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269. The statutes also limit the time within which a claim may be filed. The respondent filed in time a "claim" stating no facts and alleging no grounds upon which a refund might be based. The respondent did subsequently file a specific claim but this was done too late except as to a portion of the tax paid. The first claim stated no basis for a suit, and the second one was filed too late, except as to the amount refunded. To allow a suit to be maintained on the basis that such an amendment dates back to the first claim would defeat the practical purposes which the statute of limitations was designed to accomplish.

ARGUMENT

Section 1318 of the Revenue Act of 1921[2] (*infra*, p. 18), amending Section 3226 of the Revised Statutes, provides in part:

[2] The same provisions of R. S. Sec. 3226 are enacted in Section 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343; and Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116.

> No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *

Article 1036 of Regulations 62 (*infra*, p. 19), promulgated February 15, 1922, under the Revenue Act of 1921, provides in part:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath.

On February 27, 1923, before the last payment, the respondent filed with the Commissioner of Internal Revenue a general claim for a refund of its 1917 taxes. This was made out on Treasury Form 843 but it did not set forth any supporting facts as required by the regulations. It stated in part (R. 12):

> Claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save taxpayer's rights under the pertinent statutes governing abatements, credits, and refunds of income and excess-

profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due.

In *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269, this Court considered a purported claim for refund couched in similar general terms and held that it did not comply with the statute and was not such a "claim for refund" as the Revenue Acts require as a prerequisite to suit. It is clear that under that decision the claim filed on February 27, 1923, was not a sufficient compliance with the law on which to base the instant suit.

No formal action was taken by the Commissioner upon this alleged claim. It was never allowed, but, in effect, was rejected by the action of the Commissioner in determining immediately after its filing that there had been no overpayment and that $12,639.45 was still due the Government. See *Hart Glass Manufacturing Co.* v. *United States*, 73 C. Cls. 32, certiorari denied, 286 U. S. 556.

On July 17, 1925, respondent filed a specific claim for refund, based upon a request for a special assessment of its 1917 tax, pursuant to Section 210 of the Revenue Act of 1917 (*infra*, p. 16). This claim was filed within four years of the time when the final $12,639.45 payment of the 1917 tax was made on November 22, 1923, but more than four years after the first three payments were made, and more than five years after the respondent's 1917 return was due. The Commissioner considered this

147813—32——2

claim, decided that the respondent was entitled to special assessment, recomputed the respondent's tax liability, determined that $32,634.89 had been overpaid, but notified the respondent that only that amount of this sum paid within four years prior to the time of the filing of the second claim could be refunded. Accordingly, a refund of $12,639.45 with interest was made, but the balance of the overpayment, the amount now in suit, was not refunded.

The action of the Commissioner was correct. Under Section 3228 of the Revised Statutes and Section 252 of the Revenue Act of 1921 (*infra*, p. 17), the second claim, considered alone, clearly was filed too late, except with regard to the final payment, which is not now involved. The Court of Claims held that it was an amendment of the first claim, which had been filed within four years from the time of the earlier payments. The second claim set up for the first time sufficient grounds upon which to base a refund, predicated upon a special assessment. This was a new and independent claim and was not a mere correction, amending the original claim. The situation is similar to that presented by an amended declaration in an action at law which seeks to introduce a new cause of action or to bring in new parties defendant. Where the statute of limitations has run before amendment, the amendment does not date back to the original declaration but is equivalent to a new declaration. *Miller* v. *McIntyre*, 6

Pet. 61; *Sicard* v. *Davis,* 6 Pet. 124, 139. See also *Seaboard Air Line Railway* v. *Renn,* 241 U. S. 290; *Baltimore & Ohio S. W. R.* v. *Carroll,* 280 U. S. 491. We submit that this "amended claim," filed more than four years after the payment of the taxes sought to be recovered, is ineffective as a basis for this suit. It was effective to permit a refund only to the extent of payments made within four years next preceding its filing. See Section 284 (b) (2) of the Revenue Act of 1926 (*infra,* p. 19).

On almost identical facts the Circuit Court of Appeals for the Second Circuit has held that such an amendment was not a compliance with the statutory provisions. *Art Metal Construction Co.* v. *United States,* 47 F. (2d) 558, certiorari denied, 283 U. S. 863. See also *Zeller* v. *United States,* 46 F. (2d) 1023 (C. C. A. 2d), certiorari denied, 283 U. S. 863. This point was argued in *Leach* v. *Nichols,* 285 U. S. 165, and *United States* v. *Swift & Co.,* 282 U. S. 468, but the opinions did not discuss it, the decisions in those cases being based upon other grounds. Furthermore, if, as suggested above, the Commissioner's action in sustaining his assessment after the first general claim had been filed amounted to a rejection of that claim, no amendment would be possible, for the authorities uniformly hold that a rejected claim may not be amended after the running of the statute of limitations. *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d); *Jonesboro Grocer Company* v. *United States,* 66 C. Cls. 320, certiorari denied, 280

U. S. 562; *Mutual Life Insurance Company* v. *United States,* 72 C. Cls. 204, 49 F. (2d) 662, certiorari denied, 284 U. S. 628; *Bemis Bros. Bag Co.* v. *United States,* 60 F. (2d) 944 (C. C. A. 8th).

The court below was of the opinion that the term "claim therefor," used in the Revenue Acts (see Section 252 of the Revenue Act of 1921, *infra,* p. 17, and Section 284(b) of the Revenue Act of 1926, *infra,* p. 19, and R. S., Sections 3226 and 3228, *infra,* pp. 17, 18), has two meanings, one dealing with the power of the Commissioner to make a refund and the other with the right to maintain a suit. The opinion in the instant case stated that a general claim, asserting no particular facts or grounds upon which it is based, is sufficient to give the Commissioner jurisdiction to pass upon the validity of the taxes in question, and that, if the Commissioner is satisfied that the tax has been overpaid, he may refund the amount of the overpayment, notwithstanding that the only claim filed within the statutory period does not state the specific grounds upon which the refund is sought. The court further stated that the Commissioner must determine the validity of the tax, because the blanket claim has invested him with jurisdiction, and must refund any amount he determines to have been overpaid. Accordingly, the court below held that if this amount is determined but not refunded, a suit to recover it can be brought under Section 3226 of the Revised Statutes, if at any time before the Commissioner's rejection the taxpayer

files an amended claim which states the specific grounds upon which the refund is rightly claimed. In a later decision, *Memphis Cotton Oil Co.* v. *United States,* 59 F. (2d) 276, now pending on writ of certiorari, No. 308, October Term, 1932, the Court of Claims held that even the amendment could be dispensed with if the Commissioner ascertains facts showing that an overpayment has been made.

In two recent decisions *Electric Power & Light Corp.* v. *United States,* decided November 14, 1932, and *Johnson* v. *United States,* decided November 14, 1932, not yet reported and which are printed as an appendix to this brief, *infra,* pp. 23–50, the Court of Claims qualified the rule of the *Memphis Cotton Oil Company case.* In effect it limited that decision to cases in which the Commissioner in response to a claim for refund, inadequate to support the particular action brought, ascertains further facts from the taxpayer amplifying those stated in the claim for refund. Such information is then considered as having the same effect as though it had been stated in the claim for refund. The court said in the *Electric Power & Light* opinion:

> Had the commissioner not called for a statement of the nature of the claim and the facts with reference thereto, but had acted upon the claim and rejected it, no suit could have been maintained thereon. But having called for the facts in order to decide upon

> the claim, which facts were furnished by the taxpayer through the commissioner's agent, we fail to see wherein the situation was any different from what it would have been if the commissioner had asked the taxpayer direct to furnish the same.

The fact that within a limited time the Commissioner has authority to act on his own initiative and determine an overpayment, although his attention has not been directed thereto by a claim for refund filed in advance of his action, does not relieve a taxpayer of the statutory duty to file a claim before suit may be maintained. Orderly administration requires that the statute be complied with as fully in such a case as where the claim causes the Commissioner to consider the question of refund, or there will be no end to the complexities of its application. The Commissioner's authority to refund an overpayment of taxes ends at the expiration of the period for filing claims unless the taxpayer has by that time filed a claim which would support a suit to recover the overpayment in the event of a decision by the Commissioner unfavorable to the taxpayer. Under the decision of this Court in the *Felt & Tarrant case, supra,* such a claim is one which fully informs the Commissioner of the grounds upon which the refund is sought. Unless such a refund claim is filed within the prescribed time the authority of the Commissioner to refund is gone and the taxpayer is without a remedy in court. Otherwise, an anomalous situation

would arise where the Commissioner might allow that which the taxpayer could not compel. Except in that limited field of cases of which *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, is typical, we do not believe that such a view will bear analysis in the light of the purpose of the statutes requiring claims for refund.

The term "claim therefor" in the various Revenue Acts should be construed as this Court has construed "claim" as used in Section 3226 of the Revised Statutes. A claim must set forth specific grounds upon which a refund may be based, and it must be filed within the time prescribed by statute. An insufficient but timely claim does not become valid by being amended after the expiration of the time for filing of such claims. The purpose in providing a statutory period of limitations and in requiring claims for refund to set forth the specific grounds upon which they are based is to facilitate a prompt and fair administration of the revenue laws.

The case of *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, relied upon by respondent, is not applicable to the question now presented. In the *Bonwit Teller case* the Commissioner treated as sufficient an informal or defective claim, and this Court, recognizing the weight to be given to decisions of the Commissioner in favor of taxpayers, because no statutory review of these decisions is provided, held that the Commissioner was warranted in holding the claim to be sufficient. The

instant case presents the situation which this Court must have had in mind when it said:

> The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim. (*Bonwit Teller & Co.* v. *United States, supra,* at p. 264.)

Nor does the fact that in this case a certificate of overassessment had been issued bring the instant case within the scope of the decision in the *Bonwit Teller case.* In that case the certificate amounted to an implied agreement to repay a certain amount which was the basis of the suit. In this case the certificate (*infra,* p. 21) amounted to such an agreement only in so far as it related to the amount which was not barred by the statute of limitations and which has now been repaid. It specifically negatived any intention or agreement to pay more than this by stating that the amount of the overpayment in excess of this sum was outlawed and could not be recovered by the respondent.

We believe that this case is not within the rule of *Tucker* v. *Alexander,* 275 U. S. 228. Assuming for the moment that the Commissioner's action in November, 1923, did not amount to rejection of the original claim (in which event, for reasons stated above, there could be no amendment), nothing which the Commissioner later did can be regarded

as a waiver of strict compliance with the statute. His final action shows that he regarded the statute as not complied with and therefore would not refund so much of the overpayment as was barred. The taxpayer was not induced to let the statute run against it by anything the Commissioner did, and in this suit the Government has consistently maintained its present position.

CONCLUSION

The decision of the court below is erroneous and should be reversed, and judgment should be entered for the United States.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
GEORGE H. FOSTER,
BRADLEY B. GILMAN,
WILLIAM H. RILEY, Jr.,
Attorneys.

NOVEMBER, 1932.

147813—32——3

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Section 210 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 307, provides:

> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.
>
> For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed

its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Sections 252, 1316, and 1318, of the Revenue Act of 1921, c. 136, 42 Stat. 227, 268, 314, as amended by Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, provide in part:

> SEC. 252. (a) That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1917, * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer.
>
> SEC. 1316. That section 3228 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully col-

lected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

This section shall not affect any suit or proceeding instituted prior to the passage of

this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress.

Section 284 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides:

> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and
>
> (2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Article 1036, Treasury Regulations 62, promulgated under the Revenue Act of 1921, provides:

> ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor.

The affidavit may be made by an agent of the person assessed, but in such a case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

APPENDIX B

Income Tax Unit.
IT:E:SM.
SEW–30340.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, Mar. 28, 1927.

CERTIFICATE OF OVERASSESSMENT

Number: 795948.
Allowed: 12,639.45.
Schedule No. 25241.

STILLWATER WORSTED COMPANY, INC.,
% Factors & Finance Co., Inc.,
275 Fourth Ave., New York, N. Y.

SIRS: An audit of your income-tax return, Form 1031 and 1120, and a consideration of all the claims (if any) filed by you for the year 1917 indicates that the tax assessed for this year was in excess of the amount due.

Previously assessed:	
Original, Account #8751475	$177,338.72
Additional, May, 1920, Page 19, Line 5	267.32
Additional, August, 1920, Page 10, Line 4	25,321.91
Total assessed	202,927.95
Tax liability	166,999.17
Overassessment indicated	35,928.78
Less: Overassessment, Schedule 7222	3,293.89
Balance	32,634.89
Overassessment outlawed	19,995.44
Overassessment allowable	12,639.45

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

RECORD OF AUDIT AND REVIEW

Return audited: S. E. Wolfe, 12–28–26.

Reviewed (Unit): A. D. Sartwell, 1–4–27.

Reviewed: P. C. Lugmhopt, 1–7–27, Review Section.

Approved: Leslie Gillis, Head of Division, 1–7–27.

District: TAR–1.

Interest: 2597.79.

APPENDIX C

COURT OF CLAIMS OF THE UNITED STATES

No. L–55

(Decided November 14, 1932)

ELECTRIC POWER & LIGHT CORPORATION, SUCCESSOR TO UTAH CORPORATION, *v.* THE UNITED STATES

Mr. Claude M. Houchins for the plaintiff.

Mr. John E. Walker was on the brief.

Mr. James A. Cosgrove, with whom was *Mr. Assistant Attorney General Charles B. Rugg,* for the defendant.

This suit was instituted to recover $16,554.22, with interest, alleged overpayment of tax for 1922. The amount sued for is the tax at 12 per cent on $132,433.72, being the difference between the amount of a profit to the Utah Securities Corporation, predecessor of plaintiff, of $311,940.70 derived from the sale of certain shares of stock in 1922 reported in the consolidated return filed for 1922, but excluded from consolidated net income as an intercompany transaction, and the amount of $179,506.98, an alleged book profit, now claimed to be the correct amount upon which the tax should have been computed upon the holding that the Utah Securities Corporation and the Electric Power & Light Co. (Maine) were not affiliated.

The questions presented are (1) whether plaintiff filed a timely and legally sufficient claim for refund as a prerequisite to its right to maintain this action, and (2) whether the taxable income derived from the sale in 1922 of 18,380 shares of first preferred stock is susceptible of determination from the record, and, if so, whether such income was $179,506.78 or $311,940.70.

SPECIAL FINDINGS OF FACT

1. Plaintiff, a Maine corporation, organized March 11, 1925, under the name of Electric Power Corporation, changed its name March 12, 1925, to Electric Power & Light Corporation. March 13, 1925, it acquired all the assets and assumed all the liabilities of the Utah Securities Corporation, organized under the laws of Virginia in September, 1912, and on April 6, 1925, the Utah Securities Corporation was dissolved.

2. The Utah Corporation filed a tentative tax return March 15, 1923, and on June 15, 1923, filed a final income tax return for 1922, making certain payments on the basis thereof to the collector at New York on March 17, June 15, September 15, and December 15, 1923. Each of these payments exceeded $16,544.22, the amount sued for herein. The aforesaid return was a consolidated return which included the operations of the Utah Securities Corporation and also the operations of seven alleged subsidiary corporations, with which the Utah Corporation claimed to be affiliated, under section 240 of the Revenue Act of 1921. The total consolidated net income shown in the return was $1,049,089.99.

3. In arriving at the consolidated taxable net income so reported, upon the basis of which the total tax liability reported on the return was computed, certain intercompany eliminations from the combined net income were first made. In particular, an income item of $311,940.70 shown on the books of the Utah Corporation as a profit derived from the sale of a portion of the preferred stock of Utah Power & Light Company (Maine), one of the alleged subsidiaries, was eliminated in arriving at the consolidated net income as reported.

4. During February and March, 1927, a revenue agent of the Bureau of Internal Revenue examined in New York the books of the Utah Securities Corporation, and the operating reports and records of its seven alleged subsidiaries, and rendered a report for 1922 on the basis of a consolidation of the eight corporations included in the aforementioned consolidated return. In this report the agent recommended the allowance of an overassessment for 1922 of $82,190.70. In arriving at this recommended overassessment the revenue agent reduced consolidated net income, as reported in the consolidated return, by the amount of $657,525.57 as a result of the allowance by him of additional depreciation to certain of the eight corporations included in the affiliated group and as a result of certain adjustments made by him in other miscellaneous items other than profit on the sale of the stock in question.

The revenue agent made no adjustment of the consolidated return as filed with respect to the intercompany item of $311,940.70 referred to in finding 3. The corrected income of the Utah Securities Corporation as a separate corporation before

the elimination of any intercompany items as found by the revenue agent in 1922 amounted to $712,318. The Utah Securities Corporation was furnished with a copy of the revenue agent's report relating to the issue herein involved, as follows:

Schedule 1

	Year ended December 31, 1922.
Net income as corrected:	
Utah Securities Corporation	$712,318.00
Utah Power & Light Company	1,362,185.62
Utah Light & Traction Company	(387,989.17)
Western Colorado Power Company	(157,849.79)
Utah Power Company	288.72
Utah Securities Corporation, Inc	(40.00)
Utah Power & Light Company, Inc	(40.00)
Utah Light & Traction Company, Inc	(40.00)
Total	$1,528,833.38
Adjustments:	
Add: Interest intercompany paid	408,545.46
Purchase intercompany	259,380.00
Total	$2,196,758.84
Deduct:	
Gross sales $259,380.00	
Intercompany bonds retired 744,101.11	
Interest received intercompany 489,772.61	
Sale of stock of a subsidiary 311,940.70	
	1,805,194.42
Consolidated net income	$391,564.42

5. January 12, 1927, the plaintiff, as successor to the Utah Securities Corporation, and each of the seven claimed subsidiary corporations, filed waivers extending the time for assessment and collection of additional taxes for 1922 until December 31, 1927.

6. May 6, 1927, the Commissioner of Internal Revenue, upon consideration of the revenue agent's report hereinbefore referred to, decided and advised the Utah Securities Corporation that for 1922 it was affiliated within the meaning of the statute

with the Utah Securities Corporation, Inc. (N. Y.), the Utah Power & Light Co., Inc. (N. Y.), and the Utah Light & Traction Co., Inc. (N. Y.), and that the consolidated return filed by the Utah Securities Corporation should have included only the companies above named.

The commissioner further held and advised the Utah Securities Corporation that during 1922 the Utah Power & Light Company (Maine) (whose stock had been sold by the Utah Securities Corporation), the Western Colorado Power Company, the Utah Light & Traction Company (Utah), and the Utah Power Company (Maine), were affiliated with each other but were not affiliated with the Utah Securities Corporation within the purview of section 240 of the revenue act of 1921, and that a consolidated return should have been filed by the last-mentioned companies.

In the letter of May 6, 1927, setting forth this determination, the commissioner advised the Utah Securities Corporation, plaintiff's predecessor, that it was granted 15 days from that date within which to present a protest against the determination of affiliation.

Thereafter, on May 26, 1927, the commissioner wrote plaintiff's predecessor, the Utah Securities Corporation, a letter in which he stated that, "Reference is made to a revenue agent's report dated March 9, 1927, which discloses an apparent overassessment for the taxable year 1922 amounting to $82,190.70. The limitation imposed by law is about to expire as to the year 1922, after which a refund or credit can not be made of any amount ultimately found to have been overpaid unless a claim is filed before the expiration of such limitation. It is

therefore suggested that you prepare a claim upon the inclosed Form 843, specifically setting forth in such claim the grounds or basis of the apparent overpayment as above indicated. The claim should be properly signed by a duly authorized person and sworn to before a notary public (or other officer authorized to administer oaths for general purposes) and should be filed immediately with the Collector of Internal Revenue for the district in which the tax was assessed or paid. The accompanying copy of this letter should be attached to the claim when filed."

7. June 3, 1927, the plaintiff, as successor to the Utah Securities Corporation, filed a claim for refund on Treasury Form 843 in the name of the Utah Securities Corporation for the refund of $82,190.70, a portion of the payments made of the tax for 1922 on the basis of the consolidated return as filed. This claim was under oath and stated as follows: "Deponent verily believes that this application should be allowed for the following reasons: The result of an examination by a revenue agent as shown in a report attached to a letter addressed to the taxpayer dated April 8, 1927, from the internal revenue agent in charge of the customhouse in New York City discloses overpayment of tax for the year 1922 in amount of $82,190.70. Claim for refund of this amount is hereby made, such claim being in accordance with the suggestion contained in the letter from C. R. Nash, assistant to the Commissioner of Internal Revenue, addressed to the taxpayer and dated May 26, 1927 (Reference IT: CR: Ad–2–AHM), a copy of which is attached hereto and made part hereof."

8. On June 21, 1927, plaintiff filed a protest to the determination of affiliation as contained in the commissioner's letter of May 6, 1927, and, thereafter, was granted an oral hearing on the matter of affiliation. In this protest plaintiff insisted that the eight corporations mentioned in the consolidated return and in the revenue agent's report were affiliated during the taxable year 1922. On August 31, 1927, plaintiff's counsel mailed a letter to the commissioner, requesting that the matter of affiliation be reviewed by the office of the general counsel of the bureau. In this letter plaintiff's counsel insisted that the Utah Securities Corporation and the Utah Power & Light Company (Maine) were affiliated within the meaning of the revenue act and were entitled to file a consolidated return for 1922 for various reasons stated therein. In September, 1927, plaintiff's representative was advised that the ruling of the Income Tax Unit, as set forth in the commissioner's letter of May 6, 1927, would be sustained.

9. September 13, 1927, plaintiff filed a claim for refund on Form 843 in the name of "Electric Power & Light Corporation, successor to Utah Securities Corporation" for the refund of $82,190.70, a portion of the tax paid for 1922, on the basis of the consolidated return as filed, and "for the reasons set forth in the revenue agent's report dated March 9, 1927."

10. December 20, 1927, the commissioner made a determination of the consolidated net income and the tax of the Utah Securities Corporation and the three corporations held to be affiliated with it, as set forth in the letter of May 6, 1927, and determined a corrected taxable net income of $712,198

upon which a tax liability of $89,024.75 at 12 per cent was computed. The amount of $42,111.50, being the difference between the tax of $131,136.25 assessed on the consolidated return, as filed, and the above-mentioned tax of $89,024.75, was credited and applied by the commissioner to the nonaffiliated companies. The corrected taxable net income of $712,198 shown in this determination of the commissioner includes as taxable income the item of $311,940.70 mentioned in finding 3.

11. January 3, 1928, plaintiff filed with the commissioner a protest dated December 23, 1927, sworn to December 27, 1927, against the aforementioned determination on the ground that the eight corporations which had filed a consolidated return were affiliated within the meaning of the statute, and on the further ground that—

> The taxpayer contends that the amount of $311,940.70 is not taxable income, even if the return of Utah Securities Corporation is considered separate from that of its affiliated company, for the following reasons:
>
> * * * * *
>
> Taxpayer respectfully requests that the Treasury Department's letter be adjusted in accordance with the foregoing facts and that the determination of the tax liability of this corporation be considered jointly with the case of Utah Power & Light Company and subsidiary companies for the year 1922, for which companies protest is now pending with the special advisory committee on the questions of affiliation and depreciation.

This protest did not purport to be and was not an amendment of the claim for refund previously filed. No reference was made to these refund

claims. The language of the protest shows that rather than being a claim for refund or an amendment of the claim which had been filed on other grounds, its purpose was, first, to have the commissioner treat the eight corporations as affiliated, and, second, if this could not be done, to have the determination evidenced by the commissioner's letter of December 20, 1927, adjusted on the basis of excluding from the income of the Utah Securities Corporation, plaintiff's predecessor, the item of $311,940.70 and to have the resulting tax adjusted and applied between the plaintiff, as successor to the Utah Securities Corporation, and the other corporations which had been included in the consolidated return as to the income and tax for which companies protests were pending before the special advisory committee of the Bureau of Internal Revenue.

12. February 10, 1928, the commissioner advised plaintiff of the rejection of the two claims for refund hereinbefore referred to. The claims were disallowed on a schedule of February 28, 1928.

13. During the latter part of 1912 and the early part of 1913, the Utah Securities Corporation acquired at a cost of $15,012,904.95 certain securities issued by Utah Power & Light Company, described as follows:

Notes	$5,000,000
First preferred stock (30,000 shares), par	3,000,000
Second preferred stock (78,370 shares), par	7,837,000
Common stock (250,000 shares), par	25,000,000

Utah Securities Corporation, on its books, allocated the said cost of $15,012,904.95 to the aforesaid securities as follows:

Notes, at par	$5,000,000.00
First preferred stock, at $87.50	2,625,000.00
Second preferred stock, at $80.23 (approximately)	6,287,904.95
Common stock, at $4.40	1,100,000.00
	15,012,904.95

The aforesaid second preferred stock was convertible into first preferred stock.

14. In 1916 Utah Securities Corporation converted $2,900,000 par value of the second preferred stock into a like amount of first preferred stock, and thereafter, in 1916, sold the aforesaid $2,900,000 first preferred stock at $92.50 per share. The entire proceeds of the sale, amounting to $2,682,500, including a book profit of $355,726.47 (about $12.27 per share) was then credited on the books of Utah Securities Corporation to its investment account in second preferred stock of Utah Power & Light Company, leaving in said investment account a figure of $3,605,404.95, represented by 49,370 shares of second preferred stock at about $73.03 per share. The aforesaid profit of $355,726.47 was not reported as taxable income by the Utah Securities Corporation.

15. In 1921 Utah Securities Corporation converted $1,838,000 par of the second preferred stock into a like amount of the first preferred stock, and in 1922 Utah Securities Corporation sold the aforesaid $1,838,000 first preferred stock, converted as aforesaid, for $90 per share. The resulting book profit of $311,940.70 (18,380 shares, at approximately $16.97 per share) was reported as a nontaxable intercompany item in the consolidated return for 1922, as shown in finding 3 above.

16. The profit of $179,506.98, which plaintiff admits was realized by Utah Securities Corpora-

tion in 1922 from the sale of the aforesaid $1,838,000 par value first preferred stock, at $90 per share, is computed by the plaintiff as a profit of approximately $9.77 per share on 18,380 shares as sold, based on the original allocation of book value shown in finding 13 above. If it should be held that this amount of $179,506.98 is the correct taxable profit realized from the sale in 1922 of the aforesaid securities, and if it should be further held that the plaintiff has filed a legally sufficient claim for refund within the time required by law, based upon the same contentions raised in this cause of action, then plaintiff is entitled to a judgment for $16,554.22 with interest.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

Two questions are presented in this case. They are (1) whether the claim for refund filed by plaintiff was sufficient to entitle it to maintain this suit, and (2) whether the taxable income derived from the sale in 1922 of 18,380 shares of first preferred

stock is susceptible of definite determination, and, if so, whether such profit was $179,506.78 or $311,940.70.

Plaintiff filed two claims for refund, both being on the same ground, namely, for an alleged overpayment of $82,190.70 on the basis of a revenue agent's report made a part of the said claim. These claims were timely, inasmuch as each of the four installments of tax paid for the year 1922 was in excess of the amount of $16,554.22 herein sought to be recovered.

In the return for 1922 plaintiff claimed to be affiliated with certain other corporations which were included in a consolidated return for that year, which return showed a consolidated net income of $1,049,089.99, upon which the total tax liability of $218,765.54 paid upon said return was computed. In making that return plaintiff eliminated certain intercompany transactions between the claimed affiliated corporations, including the elimination of an item of profit stated therein of $311,940.70 derived from the sale of a portion of the preferred stock of Utah Power & Light Company (Maine), one of its alleged subsidiaries, as mentioned in finding 3.

In February and March, 1927, a revenue agent made an investigation and examination of the consolidated return and of the books and records of the plaintiff and the seven claimed subsidiary corporations. He reported a total reduction in the consolidated taxable net income in the amount of $657,525.57 and recommended to the commissioner an allowance of an overassessment for 1922 of $82,190.70. The adjustments in net income forming the basis of the allowance recommended by the

agent related principally and substantially to depreciation adjustment. No adjustments were made by the agent with respect to the intercompany items, including the item of profit of $311,940.70. The consolidated gross income of plaintiff as a separate corporation as determined by the revenue agent before the elimination of any of the intercompany items was $712,318. After eliminating the intercompany items, including the item of $311,940.70, the agent thereby reduced the consolidated net income to $391,564.42. The agent's report was dated March 9, 1927, and a copy thereof was furnished to plaintiff April 8, 1927. After the receipt of the report of the revenue agent, the Commissioner, on May 6, 1927, advised plaintiff that for the year 1922 one group of the eight companies was affiliated with each other and that the other group of four, including Utah Power & Light Company (Maine), while affiliated with each other, was not affiliated with the plaintiff.

Thereafter, on May 26, 1927, the commissioner suggested to the plaintiff that it file a claim for refund for 1922, and on June 3, 1927, plaintiff filed a claim for refund of $82,190.70 and on September 13, 1927, filed a similar claim for the same amount. In both instances the grounds specified were "the reasons set forth in the internal revenue agent's report dated March 9, 1927, which shows an overassessment of the above amount for 1922." It will thus be seen that the nature of the claims for refund and the facts relied upon, which were those stated in the revenue agent's report, had no reference to the matter which forms the basis of this suit. The item giving rise to the controversy here was not

made the basis of any portion of the refund for the claims filed. The claims were, therefore, insufficient under section 3226, Revised Statutes, to form the basis of this suit. *United States* v. *Felt & Tarrant Manufacturing Company,* 283 U. S. 269. The fact that the revenue agent's report may have embraced statements with reference to the item of $311,940.70, which constituted the facts with reference to the nature of that item, which statements were made by the agent in connection with his audit of the case and the elimination of the item from consolidated net income, is not, in itself, sufficient. *Mutual Life Insurance Company of New York* v. *United States,* 72 C. Cls. 204, 49 Fed. (2d) 662. The claims for refund were not amended so as specifically to claim a refund on the grounds now urged.

Plaintiff cites the decision of this court in *Memphis Cotton Oil Co.* v. *United States,* No. L–173 decided May 31, 1932, to support its contention that the claims filed in this case were sufficient. That case is not in point. There the taxpayer filed a claim setting forth the income which had been returned, and upon which the tax had been paid, the claimed correct net income or loss as per its books for the years involved, and claimed the refund of the resulting overpayments. Upon receipt of these claims the commissioner, *for the purpose of deciding upon the merits thereof,* instructed his agent to make an investigation and obtain the facts with reference thereto from the taxpayer by an audit and examination of its books and records. This the agent did, and the taxpayer furnished him with information as to the nature of each item and all the facts in reference to the matter, and the agent thereupon made a detailed report of the facts

and the nature of the various items to the commissioner, showing overpayments for the years involved, together with an explanation of the nature of each item as furnished by the taxpayer. These overpayments were somewhat in excess of the amounts claimed in the refund claims theretofore filed. The commissioner found the overpayments to be as stated in the agent's report. These detailed facts and the nature of each item were furnished to the commissioner by the taxpayer through the commissioner's agent before the commissioner had taken any action upon the claims. In these circumstances the court held that the statements of the taxpayer in the claims filed, taken in connection with the facts and reasons furnished to the commissioner by the taxpayer through the commissioner's agent, were sufficient to form the basis of plaintiff's suit to recover the admitted overpayments. Had the commissioner not called for a statement of the nature of the claim and the facts with reference thereto, but had acted upon the claim and rejected it, no suit could have been maintained thereon. But having called for the facts in order to decide upon the claim, which facts were furnished by the taxpayer through the commissioner's agent, we fail to see wherein the situation was any different from what it would have been if the commissioner had asked the taxpayer direct to furnish the same.

This court has in no case decided, and the *Memphis Cotton Oil Company case* is not authority for the proposition, that if the commissioner has in his possession facts upon which he might allow a re-

fund on a ground that is not made a basis of the claim for refund filed a suit may be maintained to recover a claimed or admitted overpayment, the nature of which had not been included in a claim which had been rejected. On the contrary, this court has consistently held that such a suit may not be maintained. *Mutual Life Insurance Company of New York* v. *United States, supra.* We have held that an informal or an insufficient claim for refund timely filed which would not be sufficient to constitute the basis of a suit if rejected, may, nevertheless, be allowed by the commissioner for any reason that convinces him from any facts or information in his possession that there has been an overpayment; that he has authority to make a refund thereon after the expiration of time within which he could make a refund without a claim. This was the situation in *Lancaster Cotton Mills* v. *United States,* No. J–596, decided by this court May 31, 1932. But this is quite different from saying that if such an insufficient claim is denied by the commissioner a suit may be maintained thereon because the commissioner could have allowed an overpayment. See *Factors & Finance Co., Inc.,* v. *United States,* 73 C. Cls. 707, 56 Fed. (2d) 902.

The conditions prescribed by section 3226, Revised Statutes, must be met before suit can be maintained. The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

COURT OF CLAIMS OF THE UNITED STATES

No. K–515

(Decided November 14, 1932)

GEORGE W. JOHNSON *v.* THE UNITED STATES

Mr. Edward H. Green and *Mr. Lawrence A. Baker,* for the plaintiff.

Mr. Henry Ravenel was on the brief.

Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

Mr. Charles R. Pollard was on the brief.

This suit was instituted to recover $5,969.56, with interest, overpayment of income tax for 1917.

The question presented is whether plaintiff is entitled to maintain this suit upon a claim for refund filed June 12, 1924, or upon that claim with an alleged amendment filed November 14, 1928.

The defendant insists that the claim of June 12, 1924, was not based upon any fact or ground upon which the overassessment of $5,969.56 indicated by the commissioner was determined; that the basis of this suit was not set forth in said claim as a reason or ground for the allowance of the overpayment therein claimed, and that the first claim could not be amended after it had been rejected and after the expiration of the statute of limitation for filing a claim.

SPECIAL FINDINGS OF FACT

1. During 1917 plaintiff was a member of the partnership of Endicott, Johnson & Company, of New York, engaged in the business of manufactur-

ing shoes. April 1, 1918, said partnership filed a return for 1917, pursuant to the act of October 3, 1917, showing a total tax of $1,413,028.55. Of this amount $31,061.56 was refunded, making a net payment of profits tax by the partnership of $1,381,-966.99.

2. March 30, 1918, plaintiff filed an individual income-tax return for 1917 showing a net income of $160,256.75, upon which he paid a tax of $35,245.12 on June 13, 1918. In this return plaintiff included his share of income of the partnership as shown by said partnership return for 1917, but he did not take as a credit against his net income his proportionate share of the excess-profits tax of $1,381,-966.99 paid by said partnership.

3. Thereafter during 1921 the Commissioner of Internal Revenue caused to be made an examination of the books and records of the partnership of which plaintiff was a member, which investigation indicated an additional tax due by the partnership. The only changes in the substance of the return of the plaintiff as filed by him for 1917 which were recommended by the revenue agent were based on the changes made by said agent with respect to the return filed by the partnership.

February 15, 1922, the partnership, through its attorneys, requested a conference with the Bureau of Internal Revenue for the purpose of presenting reasons and evidence in opposition to an additional assessment against the partnership. March 21, 1923, the commissioner made a jeopardy assessment against the partnership of an additional tax of $139,465, of which notice was mailed to the partnership on the same date. An additional tax of

$13,566.90 was proposed against plaintiff for 1917 by reason of an increase in the partnership's net income. Thereafter, during 1923, 1924, and 1925, numerous conferences were held in the offices of the Bureau of Internal Revenue, and briefs, appeals, and evidence were filed with the commissioner on behalf of plaintiff, individually, and on behalf of said partnership.

Several waivers were executed and filed by plaintiff individually extending the period for assessment for 1917, the last waiver being executed December 3, 1926, extending the period for assessment until December 31, 1927.

During the progress of the conferences in the bureau the parties pursued the plan of concluding consideration of the partnership case before determining the tax liability of the members, including the plaintiff. This was necessary inasmuch as the correct net income of the partners depended on the net income of the partnership.

4. June 12, 1924, plaintiff filed a claim for refund, Form 843, for $35,245.12, being the entire income tax paid by him for 1917. This claim, together with the appeal therein referred to, is in evidence as Exhibit A and is made a part of this finding by reference. The refund claim contained the following statement:

> Deponent verily believes that this application should be allowed for the following reasons:
>
> This taxpayer has filed with the Commissioner of Internal Revenue his appeal, verified March 28th, 1923, from a proposed additional assessment for the year 1917, said appeal setting forth the reasons and facts

upon which he is entitled not merely to the cancellation of the proposed additional assessment, but also to a refund of taxes. The grounds for this claim for refund are the grounds set forth in the said appeal.

The appeal referred to in the above-mentioned refund claim was signed and verified by plaintiff March 28, 1923, and had been filed as a protest against the proposed additional assessment of $13,566.90 against him for 1917, as set forth in the commissioner's letter of March 7, 1923. In this protest the plaintiff contended that the partnership of which he was a member should be consolidated with certain corporations for excess-profits tax purposes and that certain items of expense had been erroneously capitalized or disallowed completely, and made reference to the valuation of certain items for the purpose of invested capital. Finally, the appeal stated that "The taxpayer here is thus presenting the matter only in its preliminary aspects; and if it must be determined to proceed with these questions it requests an opportunity to set forth in detail its objections to the proposed additional assessment, and to furnish evidence in support thereof."

The appeal of March 28, 1923, which was made the basis of the claim for refund filed, does not contain any statement that the plaintiff was entitled to deduct on his individual tax returns his proportionate share of excess-profits tax paid by the partnership.

Prior to September 15, 1924, the partnership had filed an application for determination of its profits tax under the special-relief provisions of the act of 1917. July 15, 1924, the commissioner having

made a determination of the net income and invested capital, the partnership acquiesced in his determination of such income and invested capital as a condition to a consideration of the matter of special relief. Such acquiescence was given by the partnership July 18, 1924. Subsequently no dispute existed with respect to the income and invested capital of the partnership, the commissioner making his final determination of the partnership liability based on the agreed income and invested capital. In such determination the commissioner allowed an overpayment by the partnership of $49,864.01 for which certificate of overassessment was issued and a refund made.

From and after the date on which plaintiff's return for 1917 was filed, and continuously until February 4, 1927, when the Treasury Department promulgated Treasury Decision 3971 containing a ruling that the partners were entitled to deduct from their distributive net income of the partnership a pro rata proportion of the excess-profits tax paid by the partnership in accordance with the decision of the Circuit Court of Appeals, Second Circuit, in *Reid* v. *Rafferty,* the commissioner had held that the excess-profits tax paid by a partnership for 1917 should be deducted from the partnership's gross income in determining the distribution to be shown in the partners' individual returns. But after making the distribution of income from the remaining balance on the partnership return to the individuals, no further credit was allowed to the individual for his pro rata share of the excess-profits tax paid by the partnership. By the abovementioned ruling this practice was changed and the

overpayment which is sought to be recovered in this suit results from a credit against such distributive share of the net income of the partnership of his pro rata share of the profits tax paid by the partnership for 1917.

Plaintiff's claim for refund was considered and rejected by the commissioner December 16, 1927, on which date the commissioner advised the plaintiff by letter as follows:

> A review of your income-tax returns for the years 1917 to 1920, inclusive, in connection with the report of the internal-revenue agent in charge, * * * dated January 31, 1922, covering an investigation of your books of account and records, discloses overassessments and a deficiency in tax as follows:

Year	Deficiency in tax	Overassessment
1917		[1] $5,969.56
1918		14,187.55
1919		9,789.91
1920	[2] $7,954.32	
Total	7,954.32	23,947.56

[1] Barred by statute. [2] Waiver.

> The adjustments made to the examining officer's report have been fully explained to your representatives at recent conferences held in this office, and, as you have signed an agreement consenting to the deficiency for 1920, the case will be closed at once.
>
> With regard to the overassessment of $5,969.56 for 1917, which is barred by statute, you are advised that this overassessment results from the allowance as a deduction from

net income your pro rata share of partnership [Endicott, Johnson & Company] excess-profits taxes in the amount of $78,417.86, as provided in Treasury Decision No. 3971. As the claim for refund filed by you does not cover this point, no overassessment can now be allowed.

December 16, 1927, the time for filing a new claim for refund for 1917 had expired.

6. November 14, 1928, plaintiff by his attorney in fact presented to the commissioner an additional Form 843, styled "Amendment of Claim for Refund," asking for the refund of the said $5,969.56 for 1917, under T. D. 3971, and on the further ground that all the necessary facts in support of taxpayer's claim were contained in the returns filed by the partnership and himself and in other records in the possession of the bureau.

7. The commissioner declined consideration of the amendment on the ground that the time had expired for filing a new claim for refund and so notified plaintiff by letter of December 7, 1928.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein; the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

The question presented in this case is whether plaintiff is entitled to maintain this suit to recover an overpayment of $5,969.56 for 1917 under a claim for refund filed June 12, 1924, and whether a claimed amendment of the aforesaid claim for refund made November 14, 1928, had the effect of making the previous claim, if insufficient, valid for the purpose of suit.

So far as material to a decision of the question presented, the facts in substance are that the partnership of Endicott, Johnson & Company, of which plaintiff was a member, filed a partnership return for 1917 disclosing an income upon which the partnership paid an excess-profits tax of $1,413,028.55, a portion of which was refunded.

In March, 1918, plaintiff filed his individual income-tax return for 1917 showing a tax of $35,245.12, which he paid. In this return he did not take a deduction from his distributive share of the partnership net income of his proportionate share of the excess-profits tax paid by the partnership on its return for 1917.

At that time and continuously until February 4, 1927, when the Treasury Department promulgated Treasury Decision 3971 containing the decision of the Circuit Court of Appeals for the Second Circuit in *Reid* v. *Rafferty*, the commissioner had held that the excess-profits tax paid by a partnership for 1917 should be deducted from the partnership's gross income in determining the distribution to be

shown in the partners' individual returns. But after making the distribution of the income from the remaining balance on the partnership return to the individuals, no further credit was allowed to the individual for his pro rata share of the excess-profits tax paid by the partnership. This practice was changed in 1927 and the overpayment which is sought to be recovered in this suit results from a credit against plaintiff's distributive share of the net income of the partnership of his pro rata share of the excess-profits tax paid by the partnership for 1917.

In 1921 the commissioner caused an examination to be made of the books and records of the partnership, and in March, 1923, he made a jeopardy assessment of an additional tax against the partnership for 1917. In February, 1922, the partnership requested a conference with the commissioner for the purpose of presenting reasons and evidence in opposition to a proposed assessment against the partnership, and thereafter numerous conferences in connection with the partnership tax, and, also, in connection with that of the plaintiff, were held in 1923, 1924, and 1925, and briefs, appeals, and evidence were filed with the commissioner. In March, 1923, plaintiff filed with the commissioner a verified appeal from the proposed additional assessment against him resulting from the increase in his distributive share of the net income of the partnership resulting from the increase in the partnership income upon which the additional tax had been assessed against the partnership earlier in that month. June 12, 1924, plaintiff filed a claim for refund of $35,245.12 for 1917. Under

certain waivers which had been executed by him, this claim was timely. The appeal that had been filed by plaintiff with the commissioner was made a part of this claim as to the facts and the grounds upon which said claim was based. The appeal related to the consolidation of the partnership with certain corporations and questioned the proposed additional assessment against him as a result of the disallowance of items of expense which were proposed to be capitalized or disallowed completely by the commissioner, and other questions were raised as to the valuation of items for the purpose of invested capital.

The question whether the plaintiff was entitled to take a credit against his distributive share of the net income of the partnership of his pro rata share of the excess-profits tax paid by the partnership was not mentioned in the appeal which was made the basis of the claim for refund, nor was this matter ever thereafter drawn into question or urged before the commissioner by the plaintiff until November 14, 1928, almost a year after the commissioner, on December 16, 1927, had rejected the claim filed June 12, 1924. In these circumstances, the claim first filed can not form the basis of this suit to recover the overpayment of $5969.56 resulting entirely from crediting against plaintiff's distributive share of the net income of the partnership of his pro rata share of the excess-profits tax collected from the partnership for 1917. *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269; *Electric Power & Light Corporation* v. *United States*, No. L–55, decided by this court November 14, 1932. The attempted amendment of

the claim for refund on November 14, 1928, was without effect. *Sugar Land Railway Co.* v. *United States,* 71 C. Cls. 628, 48 Fed. (2d) 973. *Mutual Life Insurance Co. of New York* v. *United States,* 72 C. Cls. 204, 49 Fed. (2d) 662.

It is insisted however by the plaintiff that the commissioner had before him all the facts that could be furnished with reference to the net income of the partnership and the plaintiff's distributive share thereof for 1917, and that all the facts necessary to a proper computation of plaintiff's tax were, therefore, adequately known to the commissioner prior to and at the time of the filing of plaintiff's claim on June 12, 1924; that the facts set forth by plaintiff in his appeal to the commissioner in protest of the proposed additional assessment against him for 1917, by reason of an increase in the net income of the partnership, were adequate to show said net income and plaintiff's distributive share thereof and that his failure to point out to the commissioner in the claim that, as a matter of law, he should credit a portion of the excess-profits tax paid by the partnership against the distributive share of the partners was not vital to the adequacy of the claim under section 3226, Revised Statutes; that, even if the facts upon which the right of plaintiff to recover the admitted overpayment were omitted in the claim, this would not prejudice the commissioner nor prevent him from making a determination of the amount of the overpayment from the facts otherwise in his knowledge and possession. We can not agree with this contention. Before a suit can be maintained to recover an overpayment of tax, it must be shown that the nature

of the items made the basis of the suit was brought to the attention of the commissioner in connection with plaintiff's claim for a refund. *Mutual Life Insurance Co. of New York* v. *United States, supra. Lancaster Cotton Mills* v. *United States,* No. J–596, decided by his court May 31, 1932; *Electric Power & Light Corp.* v. *United States, supra.*

The petition must be dismissed. It is so ordered.

*W*HALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

Office Supreme Court
FILED
DEC 13
CHARLES ELMORE

No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES, PETITIONER

v.

FACTORS & FINANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

INDEX

Citations:	Page
King's County Savings Institution v. *Blair*, 116 U. S. 200	4–5
Lewis v. *Reynolds*, 284 U. S. 281	8
Lorenzen v. *United States*, 41 F. (2d) 369, aff'd, 52 F. (2d) 106	7
Magnolia Petroleum Co. v. *United States*, 63 C. Cls. 173	5
United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269	5
Miscellaneous:	
Treasury Decision 3240, 5 Cumulative Bulletin 313	10
Law Opinion 1116, III–1 Cumulative Bulletin 350	3
General Counsel's Memorandum 602, V–2 Cumulative Bulletin 97	4
Treasury Decision 4265, VIII–1 Cumulative Bulletin 110	12

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 141

THE UNITED STATES, PETITIONER

v.

FACTORS & FINANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

Counsel for respondent have filed, by leave of Court, a Supplemental Brief discussing in detail certain Regulations, Treasury Decisions, law opinions and other administrative rulings which, they contend, disclose that it has been the long-continued practice of the Bureau of Internal Revenue to accept, after the expiration of the statutory period of limitation, amendments to refund claims timely filed, even though such amendments assert new grounds for refund not set forth in the original claims. We disagree with respondent's interpretation of the various rulings referred to in its Supplemental Brief.

It has been the consistent practice of the Bureau of Internal Revenue to permit the amendment of refund claims after the expiration of the statutory period for filing original claims only when the amendment (1) relates to the same ground previously asserted in a written claim filed within time, or (2) has for its purpose the correction of a purely formal defect in the original claim. The Commissioner has recognized as sufficient and proper claims for refund, subject to amendment, amplification, or perfection, only those claims which had been timely filed and which set forth with reasonable clarity, either in express language or by appropriate reference to another document already on file or to one attached to the claim itself, some ground or reason for the recovery of the disputed tax. We are advised by the Commissioner of Internal Revenue that for many years no exception has been authorized and no amendment permitted after the bar of the statute of limitations that would operate to set up a new and different ground, reason, or cause. (See letter, Appendix C, *infra.*)

All of the rulings of the Commissioner of Internal Revenue to which the respondent refers support our statement of what has been the consistent departmental practice.

Treasury Decision 3240, printed as Appendix A, *infra,* sets forth clearly conditions under which the Bureau of Internal Revenue would consent to reopen a case that had previously been finally settled

and closed under its customary administrative practice. It extended to taxpayers, whose cases had been closed, the privilege of securing reconsideration of their claims only "(1) where a showing is made of new and material facts, accompanied by an explanation, satisfactory to the Commissioner of Internal Revenue, of the failure to produce such facts prior to the closing of the case, or (2) where the case is materially affected by the change of regulations or by the final decision of another case either by the Commissioner of Internal Revenue or by a court of competent jurisdiction."

This Treasury Decision expressly did not modify the existing regulations relative to the filing of claims for refund. It stated clearly the conditions under which a case might be reopened, but did not express any intent to permit the presentation of a new ground for refund, different from that previously acted upon under the guise of an amendment to the original claim.

Law Opinion 1116, III–1 Cumulative Bulletin 350 (1924), squarely supports our argument in the instant case and holds that a refund claim timely filed can not be "amended" after the expiration of the statutory period for filing a new claim to include a new ground for refund different from those stated in the original claim. Amendment was, however, permitted after the statute had run with respect to a claim which was filed in time but defective in form.

General Counsel's Memorandum 602, V–2 Cumulative Bulletin 97 (1926), permitted an amendment of a claim for refund timely filed and defective in form only in that the claimant, an attorney in fact, neglected to attach to the refund claim a copy of his power of attorney, as was expressly required by the applicable regulations. This omission was considered to have been cured by the filing, out of time, by the taxpayer himself of a later and perfected claim.

Treasury Decision 4265, printed as Appendix B, *infra,* promulgated March 27, 1929, concisely stated the same principles as had theretofore been applied by the Commissioner of Internal Revenue and by this and other courts in determining the sufficiency of a claim for refund. The requirement that "The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof" is manifestly no different from the principle applied in *Law Opinion 1116, supra,* and in the instant case by the Commissioner of Internal Revenue at the time he first rejected respondent's refund claim in April, 1926. It is true that in this decision the Commissioner of Internal Revenue used the word "must" rather than the word "should" as had been done in all prior regulations.[1] We do not think this

[1] In *Kings County Savings Institution* v. *Blair,* 116 U. S. 200, the Court stated that the Treasury regulations prescribing the forms and procedure for the refunding of taxes in

significant for the reason that the then long established practice and rulings of the Bureau of Internal Revenue clearly limited effective refund claims to those which did in fact contain language sufficient to reasonably indicate the subject matter, basis, or ground relied upon. This Court has since (1931) approved the administrative practice and held that it is in accordance with the express provisions of the statutes. *United States* v. *Felt & Tarrant Mfg. Company,* 283 U. S. 269, 272.

We are unable after investigation to discover any justification for the finding of the Court of Claims in *Magnolia Petroleum Co.* v. *United States,* 63 C. Cls. 173, 188, quoted on page 1 of respondent's supplemental brief. It is apparent from that opinion that this finding of fact was not material to the decision, which turned solely upon a question of law

---

force from January 1, 1871, to December 31, 1878, were put in evidence, and quoted the following (apparently from such regulations):

"Claims for the refunding of taxes and penalties alleged to have been erroneously or illegally collected must be made out upon Form 46 in this case. *The burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath.*" (Italics ours.)

Substantially the same language as that which we have italicized has appeared continuously in the regulations of the Department:

United States Internal Revenue Regulations No. 14, Revised (Issued in 1916), p. 25; Regulations 33, Article 265; Regulations 45, Article 1036; Regulations 62, Article 1036; Regulations 65, Article 1306; Regulations 69, Article 1304; Regulations No. 74, Article 1254.

as to whether the interest provisions of the Revenue Act of 1921 or 1924 were applicable. The decision was reversed by this Court, 276 U. S. 160, and the case remanded because of "ambiguous findings" with instructions to the lower court to make definite determination of the controlling facts. There is attached hereto as Appendix C a letter from the Commissioner of Internal Revenue showing the past and present practice of the Bureau of Internal Revenue in its treatment of taxpayers' claims for refund. This letter squarely contradicts the finding of the Court of Claims to which reference is made in the preceding paragraph of this brief.

In a brief *amici curiæ* in the instant case and in *United States* v. *Prentiss & Co., Inc.,* No. 234, and in *United States* v. *Memphis Cotton Oil Company,* No. 308, it is argued that there is but one cause of action to recover federal income taxes for a particular year and that this cause of action is for the overpayment of any sum wrongfully collected; that separate and distinct grounds for the overpayment do not constitute individual causes of action but are inseparable parts of an indivisible whole; that consequently having once set forth a cause of action generally in a claim for refund of an overpayment the taxpayer may subsequently shift the grounds of the demanded refund by adding new facts and reasons for the refunding of the tax paid; and that this may be done at the will of the taxpayer even

after the bar of the statute of limitations has fallen since the original refund claim timely filed stated the one and only cause of action.

This argument is based upon a misapplication of the analogy suggested by the Government between a refund claim and a declaration or petition filed in court. While, for certain purposes, it is undoubtedly proper to regard the overpayment of taxes for a given year as constituting a single cause of action, nevertheless the Revenue Acts permit recovery of only such part of the overpayment as is covered by a claim for refund. The "cause of action" asserted in a refund claim is, therefore, only that part of the total payment which is specifically described in the claim. And the Commissioner is not called upon to determine whether there has been an overpayment by reason of facts or upon legal grounds not set forth in the claim.

Lorenzen v. *United States,* 41 F. (2d) 369 (W. D. Mo.), affirmed 52 F. (2d) 106 (C. C. A. 8th), supports our view, although it involves an amended petition rather than an amended claim for refund. Plaintiff was suing to recover taxes on distilled spirits alleged to have been illegally collected. His original petition set forth one ground for recovery, which the court held invalid. After the statutory period for filing suit had expired, an amended petition was filed, asking for recovery on different grounds. It was held that the amended petition stated a "new and distinct cause of action" and

was barred by the statute. It would seem that on the theory advanced in the brief *amici curiae* the claim for recovery of the tax in the *Lorenzen case* would have constituted the one and only cause of action which should have been subject to amendment at any time. But the court held otherwise.

We submit that *Lewis* v. *Reynolds*, 284 U. S. 281, does not support the contention of *amici curiæ*. It is true that the ultimate question presented upon a claim for refund is whether the taxpayer has overpaid his tax and that the Commissioner may assert a deficiency as was done in the *Reynolds case* by way of set-off against an overpayment because only actual overpayments can be refunded. It is equally true, and well settled, that the Commissioner can not be compelled to redetermine the entire tax liability to the extent of allowing a refund predicated upon grounds not set forth in the claim. The *Reynolds case* holds merely that only an actual overpayment can be refunded and is no authority for the proposition that two grounds for refund constitute a single cause of action.

If the overpayment of taxes for a given year is to be regarded as the one and only cause of action with respect to a claim for refund then it would seem that it should be sufficient for the taxpayer to file a general refund claim stating merely that the tax for a designated year has been overpaid. We submit that the fact that this is not permitted by

the statutes is in the last analysis the complete and final answer to the argument advanced in the brief *amici curiæ*.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
GEORGE H. FOSTER,
JOHN A. REES,
H. BRIAN HOLLAND,
Attorneys.

DECEMBER, 1932.

APPENDIX A

Treasury Decision 3240

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

To collectors of internal revenue and others concerned:

Where any case in the Bureau of Internal Revenue has been finally closed after the taxpayer, or other party thereto, has had a hearing or has been afforded by written notice an opportunity to present oral or written arguments or statements of fact in support of his contentions, the case will not be reopened except (1) where a showing is made of new and material facts, accompanied by an explanation, satisfactory to the Commissioner of Internal Revenue of the failure to produce such facts prior to the closing of the case, or (2) where the case is materially affected by the change of regulations or by the final decision of another case either by the Commissioner of Internal Revenue or by a court of competent jurisdiction. The application for reopening a case should be addressed to the Commissioner of Internal Revenue, should state succinctly the facts and circumstances upon which the application is based, and must be supported by the affidavit of a person having knowledge of the facts.

This decision is not to be construed as modifying the regulations relating to the filing of claims in abatement or claims for refund, nor as denying the right of a taxpayer to a hearing or to an appeal at any stage of his case until the case has been finally closed. After the taxpayer has exhausted his remedies within the Bureau, however, and the case has been finally closed, it will be reopened only under the conditions stated in the decision.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved October 31, 1921.

A. W. MELLON,
Secretary of the Treasury.

Appendix B

Treasury Decision 4265

Treasury Department,
Office of Commissioner of
Internal Revenue,
Washington, D. C.

To all collectors of internal revenue and others concerned:

(1) Except as provided in paragraph (2), a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitation applicable to the filing of a claim therefor (computed without regard to the filing of any so-called informal or defective claim) unless prior to the expiration of such period a formal claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed, nor will any claim which does not comply with such regulations be considered for any purpose as a claim for refund or credit. (See e. g. Reg. 14; art. 1036, Reg. 45 and 62; art. 1306, Reg. 65; art. 1304, Reg.69; art. 1254, Reg. 74; Law Opinion 1116 (C. B. III–1, 350); T. D. 4625 (page 110, this Bulletin).)

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal

or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4625, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 27, 1929.

A. W. MELLON,
Secretary of the Treasury.

APPENDIX C

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

GD: C: FFT 235086

TREASURY DEPARTMENT,
Washington, December 12, 1932.

Hon. CHARLES B. RUGG,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

In re *U. S.* v. *Factors and Finance Company, Inc.*

SIR: During the argument of the above case in the Supreme Court on December 8, 1932, counsel for the respondent contended that the present position of the Government with respect to the amendment of claims for refund is inconsistent with the practice of the Bureau of Internal Revenue existing prior to the promulgation in 1929 of T. Ds. 4265 and 4266, C. B. VIII–1, p. 110.

It has been the consistent practice of the Bureau, at least since the approval of Solicitor's Law Opinion 1116, C. B. III–1, p. 350, to refuse to recognize the right of a taxpayer to amend a claim for refund after the statute of limitations had expired by adding grounds not previously stated. This law opinion was approved on April 30, 1923, though it

was not published until 1924. Prior to May 1, 1929, it was the practice of the Bureau to permit the amendment of informal claims for refund at any time. However, such amendments were permitted with respect to matters of form only. On March 27, 1929 T. D. 4266 was promulgated which required informal claims then on file to be amended on or before May 1, 1929, and thereafter to require all claims to conform strictly to T. D. 4265 which also took effect on May 1, 1929.

In a communication to the Secretary of the Treasury dated March 22, 1929, recommending the approval of T. Ds. 4265 and 4266, the then Commissioner of Internal Revenue stated that the purpose of these regulations was as follows:

> I am transmitting herewith for your approval two proposed Treasury Decisions relating to claims for refund.
>
> A large number of so-called "informal claims" for refund or credit of internal revenue taxes have been filed with the Bureau. Under an opinion of the Attorney General, which has been followed by the Bureau, the filing of these claims is sufficient to stay the statute of limitations and they may be perfected at any time. It is believed that this situation should be remedied by prescribing that, as a general rule, any claim which does not comply with the Regulations will not be considered as a claim for any purpose. The first proposed Treasury Decision adopts this general rule. In order to avoid harsh results, however, it also provides that any such claim might be perfected before May 1st of this year.

The second proposed Treasury Decision prescirbes the requirements of a formal claim. This decision does not materially change the present practice, but embodies that practice in formal Regulations.

Respectfully,

DAVID BURNET,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

FILED
JUL 16 1932
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, PETITIONER,

v.

FACTORS & FINANCE CO., INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

J. GILMER KÖRNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
MYRON A. FINKE,
SAMUEL M. FISHER,
Of Counsel.

July, 1932.

INDEX.

	PAGE.
Question Presented	1
Statutes and Regulations	2
Statement	4
Reasons for Denying the Writ	7
Summary of Reasons for Denying Writ	7
1. *Bonwit Teller & Co.* v. *U. S.* rules this case	8
2. Decision below consonant with *Tucker* v. *Alexander*	9
3. Decision below ruled by *Tucker* v. *Alexander*	10
4. Regulations were not mandatory	10
5. Statutes under consideration are remedial	11
6. Statute makes no provision for content of claim	11
7. Decision in instant case not in conflict with *Art Metal Construction Co.* v. *U. S.*	12
8, 9. Decision in instant case not in conflict with decided cases	15–16
10. Decision of Court of Claims is in harmony with decided cases	17
11. *U. S.* v. *Felt & Tarrant Mfg. Co.* does not support instant petition	18
12. Instant decision is not of current importance and presents no administrative difficulties	19
Conclusion	20

TABLE OF CASES.

Art Metal Construction Co. *v.* U. S., 47 F. (2d) 558....8, 12, 13, 15, 18, 20

Bemis Bros. Bag Co. *v.* U. S. (E. D. Mo.), 56 F. (2d) 407 16

Bonwit Teller & Co. *v.* U. S., 283 U. S. 258 7, 8

Elbee Chocolate Co. *v.* U. S. (E. D. N. Y.), —— F. (2d) — 15

Felt & Tarrant Mfg. Co. *v.* U. S., 283 U. S. 269 8, 18

Jonesboro Grocery Co. *v.* U. S., 66 C. Cls. 320 16

Lancaster Cotton Mills *v.* U. S., —— C. Cls. — 17, 18

McKesson & Robbins, Inc. *v.* Edwards, 57 F. (2d) 147....13, 15, 18, 20

Marble Chair Co. *v.* U. S. (N. D. Ohio), — F. (2d) — 15

Memphis Cotton Oil Co. *v.* U. S., — C. Cls. — 17

Mutual Life Insurance Co. *v.* U. S., 49 F. (2d) 662 16
National Cattle Loan Co. *v.* U. S. (E. D. Ill.) — F. (2d) — 16
Prentiss & Co., Inc. *v.* U. S., 57 F. (2d) 676 ..... 13, 14, 15, 18, 20
Solomon *v.* U. S., 57 F. (2d) 150 ..... 13, 14, 16
Sugar Land Rwy. Co. *v.* U. S., 71 C. Cls. 628 16
Tucker *v.* Alexander, 275 U. S. 228 ..... 7, 9, 10, 11

STATUTES AND REGULATIONS.

Section 284 of the Revenue Act of 1926 2
Revised Statutes, sec. 3228 3
Revised Statutes, sec. 3226 ..... 3, 11
Regulations 62, Art. 1036 ..... 3, 11
Regulations 45, Art. 1036 11

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, *Petitioner*
v.
FACTORS & FINANCE CO., INC.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF OF FACTORS & FINANCE CO., INC.

QUESTION PRESENTED.

Because of respondent's belief that petitioner's statement of the question presented to this Court does not adequately reflect the specific question arising upon this record, the respondent submits the following statement which it is believed more clearly and adequately presents the question now before the Court:

Within the statutory period for filing claims for refund respondent filed a claim for refund on Treasury Form 843 specifying the year and the amount claimed and stating that its tax liability had not been finally passed upon by the Commissioner, and that its claim was filed in order to save the taxpayer's rights under the pertinent statutes governing refunds of taxes and in order to permit the Commissioner to refund any excess paid over taxes actually found to be due. After the period for filing claims had expired, but before the Commissioner had considered or passed upon its claim, respondent filed with the Commissioner an amendment and amplification of its claim for refund, which set forth fully and completely the

nature of its claim and the supporting data in support thereof. Thereafter the Commissioner took up the claim for consideration, held hearings thereon, determined that respondent had overpaid its taxes in the amount of $32,634.89, and in writing advised respondent to that effect. Thereafter the Commissioner refunded to respondent $12,639.45 and refused to refund the balance of $19,995.44. The question is, whether in the circumstances of this case, a claim for refund for a particular year, timely filed, but which does not set forth the specific items causing an overpayment, could be amplified and amended, before the Commissioner had considered it and acted upon it, so as fully to set forth all the facts and the grounds in support of its claim for the said year.

STATUTE AND REGULATIONS INVOLVED.

Section 284 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides in part as follows:

> Sec. 284 (a) Where there has been an overpayment of any income, war profits, or excess profits tax imposed by this Act * * * the Revenue Act of 1917 * * * or any such Act as amended, the amount of such overpayment shall * * * be credited against any income, war profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.
>
> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made * * * after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and
>
> (2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Article 1036 of Regulations 62, promulgated under the

Revenue Act of 1921, which were in force at the time of the filing of the instant refund claim provides in part:

> *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. * * * All the facts relied upon in support of the claim should be clearly set forth under oath.

R. S. 3228 (a) as reenacted in Section 1012 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 342, provides:

> Sec. 3228 (a). All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the revenue act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

R. S. 3226 as reenacted in section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides:

> Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such

claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

STATEMENT.

Respondent sued in the Court of Claims to recover an overpayment of $19,995.44 of income and excess profits taxes for the year 1917.

The Court of Claims found, among others, the following facts:

June 15, 1918, plaintiff duly filed its income and profits tax return for the calendar year 1917 and on or about that date paid to the collector the tax shown thereon of $177,338.72.

February 27, 1923, before the Commissioner had made a determination as to the tax liability of the plaintiff, the plaintiff filed its Claim for Refund of $177,606.04 for the year 1917. This Claim for Refund was filed on Treasury Form 843 and recited the amount claimed to be refundable and recited that said amount had been paid on June 15, 1918, and June 30, 1920. This claim was under oath and set forth that it was filed for the purpose of enabling the Commissioner to refund to plaintiff any amount of taxes paid for 1917 in excess of its true tax liability which had not been determined by the Commissioner. The claim stated that "claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save the taxpayer's rights under the pertinent statutes covering abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the Commissioner to refund to deponent any excess paid over taxes actually found to be due." The filing of this claim was timely and within the statutory period for filing thereof.

The Commissioner took no action with reference to plaintiff's refund claim, either as to its allowance or rejection, either by way of hearing, consideration, or determination thereof prior to July 17, 1925.

On July 17, 1925, and prior to any action being taken upon,

or consideration, or determination given to, the claim for refund filed February 27, 1923, plaintiff duly filed an amendment to its claim for refund, in amplification thereof. In this amendment and amplification plaintiff stated, and specified, that its true tax liability should be determined pursuant to the provisions of section 210 of the Revenue Act of 1917. It asked that its claim theretofore timely filed on February 27, 1923, be allowed in the amount therein claimed. The amendment and amplification, calling the attention of the Commissioner to the pertinent provisions of existing law applicable to plaintiff's refund claim, under which it was entitled to have its true tax liability computed and determined, likewise contained a statement of facts and data in support of its claim. The amendment and amplification also contained the statement that "Before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim, setting forth the details in the matter. Taxpayer hereby makes application for assessment under the provisions of section 210, of the revenue act of 1917, for the reasons set forth in the attached sheets, and respectfully requests the tax adjustments shown thereon."

Thereafter the Commissioner entered upon a consideration of the claim for refund and in connection therewith considered the amendment or amplification thereof filed July 17, 1925. The Commissioner appointed a hearing to be held on June 22, 1926, and advised plaintiff that "All of the evidence as to law and facts, which you desire to have considered-by the Bureau in the final determination of the abnormality or abnormalities alleged, must therefore be submitted at once or as far in advance as possible of the date above fixed, in order that the fullest consideration may be given thereto."

On June 22, 1926, the hearing was held in the Bureau at which plaintiff appeared and submitted evidence in support of its refund claim.

Thereafter the Commissioner considered plaintiff's original and amended claims for refund and the evidence submitted in

support thereof and held that the profits tax for 1917 should be computed under section 210 of the 1917 Act, as claimed. Accordingly, he determined that the true tax liability of plaintiff for 1917 was $166,999.17 instead of the amount of $199,634.06 theretofore collected from the taxpayer. He therefore determined that plaintiff had paid as taxes $32,634.89 in excess of the true amount of tax due for 1917.

Accordingly, on January 13, 1927, the Commissioner advised plaintiff that "After a careful review of your protest *and of all the evidence submitted in support* of your contentions *in a conference held in this office on June 22, 1926*, you are advised that the bureau holds that your profits tax for the year 1917 should be computed under the above mentioned provisions [sec. 210, Revenue Act of 1917]," (italics ours) and computed an overpayment of $32,634.89.

Thereafter the Commissioner, on April 8, 1927, executed and mailed to plaintiff a "Certificate of Overassessment" on Treasury Form No. 7776–c, setting forth the true tax to be $166,909.17 and further setting forth that the payments made by plaintiff in excess of its true tax liability were in the amount of $32,634.89. On June 21, 1927, the Commissioner refunded to plaintiff $12,639.45 together with $3,028.24 interest paid thereon, but declined and refused to refund the balance of $19,995.44 of the total amount of $32,634.89 found and determined by him to have been overpaid by the plaintiff for 1917.

This suit was filed in the Court of Claims on January 9, 1929. The Court gave judgment on March 7, 1932, in the amount of $19,995.44 with interest. The Court held that the provisions of the revenue acts are mandatory in their provisions that the Commissioner shall audit the return, determine the correct tax liability, collect any tax found to be due and refund any amount which has been paid in excess thereof, in case the taxpayer has duly filed a claim therefor; that the filing of such claim gives the Commissioner the authority and jurisdiction to make refund of the amounts *found by him* to be properly refundable; that the Commissioner, having authority and jurisdiction so to do, and having determined that an over-

payment had been made, was not limited to the theory, grounds, or items of computation that might be the basis of determining it; and that a refund claim having been timely filed, such claim may be amended or amplified prior to action by the Commissioner on such claim, so as to bring before the Commissioner all the grounds and facts in support of such claim, and that where the Commissioner has before him all such facts and data and considers them in arriving at his determination on the claim, the allowance of the claim is not barred by the statute of limitations even though such amendment and amplification, filed before consideration of the claim, were filed after the period in which the original claim might have been filed.

Respondent believes it to be accurate to state that the Court did not decide that the filing of an amendment or amplification to a timely claim stops the operation of the statute of limitations, but that a timely claim which stays the running of the statute may be amended or amplified prior to consideration of the claim and that an overpayment determined by the Commissioner upon consideration of the timely claim so amended and amplified, is not barred by law, and that upon such determination of overpayment the plaintiff is entitled to maintain its suit for the recovery of the amount so determined.

REASONS FOR DENYING THE WRIT.

Summary of Reasons.

1. The decision in the instant case is ruled by the decision of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258.

2. The decision in the instant case is consonant with the rule of this Court in *Tucker* v. *Alexander*, 275 U. S. 228, in that obviously the Commissioner was not deceived or misled in passing upon this claim.

3. The decision in the instant case is ruled by the decision of this Court in *Tucker* v. *Alexander*, *supra*, in that the Commissioner did in effect waive the defects in the original claim when he considered and passed upon such claim as amended.

4. The Regulations in force when the instant refund claim was filed were not mandatory.

5. The Statutes under consideration are remedial.

6. The Statute relating to suits for refund makes no provision as to the contents of the claim.

7. The decision in the instant case is not in conflict with the decision by the Circuit Court of Appeals, Second Circuit, in *Art Metal Construction Co.* v. *U. S.*, 47 F. (2d) 558.

8 and 9. The decisions cited on page 5 of the Petition and Transcript of Record do not support the petition for certiorari but support the principle announced in the instant decision in the Court of Claims.

10. The decisions of the Court of Claims on this point are in harmony with the decisions of other courts.

11. The decision in *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, does not support the instant petition for certiorari.

12. The instant decision is not of current importance but merely applies an established principle to the facts of this case and presents only the degree of such application to the facts of this particular case. No administrative difficulty is presented by the decision in the instant case.

1. The decison in the instant case is ruled by the decision of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258. In that case a timely, though informal and insufficient, claim was amended by the filing of a claim on Form 843 after the period for filing claim had expired. This Court held that taxpayer could maintain its suit in the Court of Claims for the overassessment determined because there was a reasonable or substantial compliance; that the Commissioner was advised of the grounds on which rested the right to refund and that he was not misled or deceived, for the reason that before he made his determination of overassessment he had all the additional information necessary to make such determination. This Court said:

> The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim. No statute provides for

review of the Commissioner's determinations in favor of taxpayers when made within the scope of his authority. Such rulings are entitled to much weight. In this case he had already found that in 1919 plaintiff had overpaid its tax in the amount stated. He needed no additional information to enable him to determine whether credit or refund should then be made. There is no suggestion that the allowance was induced by or resulted from fraud or mistake. The facts found disclose that there was a reasonable or substantial compliance with the amendment. The Commissioner within the time allowed was advised of the grounds on which plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim and was fully warranted in holding that the waiver and earlier documents were sufficient. Tucker *v.* Alexander, 275 U. S. 228, 231, 72 L. ed. 253, 256, 48 S. Ct. 45.

2. The decision in the instant case is consonant with the rule of this Court in *Tucker* v. *Alexander*, 275 U. S. 228. In that case, the regulation under review (Art. 1036 of Regulations 45) was mandatory that all facts should be set forth. The regulations under review in the instant case are not mandatory. (This point is discussed hereinafter.) In *Tucker* v. *Alexander* this Court held:

> *The statute and regulations must be read in the light of their purpose.* They are devised not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. *Failure to observe them does not necessarily preclude recovery.* If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. *If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here,* it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. (Italics ours.)

3. The decision in the instant case is further ruled by the decision of this Court in *Tucker* v. *Alexander, supra,* where it is held that the provisions of the revenue act requiring presentation of a claim for refund before instituting suit to recover such refund, and of the regulations requiring all facts relied upon in support of such claim to be clearly set forth, may be waived by the Commissioner.

In the instant case a formal claim for refund was timely filed but all the facts relied upon were not specified. Thereafter, the claim was amended and amplified so as specifically and fully to set forth all the facts and reasons relied upon in support of the claim. After the claim was so amended and amplified the Commissioner notified the taxpayer that the claim would be taken up for consideration, and advised the taxpayer of a date for a hearing on the claim. Hearings were held on the claim *as amended* and *thereafter the Commissioner proceeded to consider the claim as amended and upon such consideration determined and decided* that the taxpayer had overpaid its taxes in the amount of $32,634.89. Thereafter the Commissioner advised the taxpayer of this fact, and later the Commissioner executed and mailed to the taxpayer a formal Certificate of Overassessment setting forth that the amount paid by the taxpayer in excess of its true tax liability was $32,634.89.

By his action the Commissioner waived any defects which may have existed in the claim as originally filed. In *Tucker* v. *Alexander, supra,* this Court said:

> If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. *We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose.* (Italics ours.)

4. The Regulations in force when the instant claim for refund was filed *were not mandatory.* Those Regulations did not

require that all the facts relied upon in support of the claim must be set forth in the claim. In *Tucker* v. *Alexander*, *supra*, the Court said: "And article 1036 of Treasury Regulations No. 45 (1920 ed.), in force when the claim for refund was filed, requires * * * that 'all the facts relied upon in support of the claim shall be clearly set forth under oath.'" The Regulation here under consideration is contained in article 1036 of Regulations 62, which provides that "all facts relied upon in support of the claim *should be* clearly set forth under oath." (Italics ours.)

Regulations 62 were the Regulations which next followed Regulations 45. The change in the language of the Regulations is significant. Such a change would hardly be inadvertent.

It should be further noted that in both Regulations 45 and 62, the *only requirement* as to the form *of the claim* is that it shall be made on Form 843. *Neither of those Regulations require that all the facts* in support of the claim *shall be contained in the claim.* Regulations 45 merely provides that all the facts in support of the claim shall be clearly set forth under oath. Regulations 62 merely provides that such facts should be so set forth under oath.

Neither the statute nor the regulations prescribe as a *sine qua non* to the *validity* of a refund claim that it shall contain on its face all the facts relied upon in support of it.

The attempt of the Commissioner to construe the statute and the regulations beyond their clear import is unwarranted.

5. The statutes under consideration are remedial and all doubts should be resolved in favor of the claimant in order to effectuate the remedy, and narrow and technical constructions should be avoided. If a substantial compliance with the statute can be found and the Commissioner has been enabled to act on the claim intelligently and in light of all the facts, the Court of Claims properly held the claim to be good.

6. As the Court of Claims has clearly pointed out, the *statute* (sec. 3226 R. S., *supra*) relating to the maintenance of suits in the courts, makes no provision as to the contents of a

claim. It merely provides that a claim for refund must be filed.

7. The decision in the instant case is not in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, in *Art Metal Construction Co.* v. *U. S.*, 47 F. (2d) 558. When that decision is read in connection with the more recent decisions rendered by the same Court, this will clearly appear.

The *Art Metal Construction Co.* case was decided February 2, 1931. In that case it appears that the taxpayer filed a general claim for refund of the nominal amount of $1.00 without specifying the year for which claim was made or the amount claimed as erroneously collected. The Circuit Court of Appeals, Second Circuit, held that this was not a claim for refund but was merely a notice or warning that a refund claim might in future be filed; that the supposed claim called for no action and was not susceptible of any action by the Commissioner; that it bore no evidence that the taxpayer had any present complaint in mind. The Court held that a claim subsequently filed *for the year 1918* specifying the grounds therefor, but filed after the statutory period for filing, was not an amendment to the purported claim originally filed because the original document was not a claim at all but a mere notice that a claim would be filed.

The Court, in deciding *Art Metal Construction Co.*, in effect adopted the same principle laid down by the Court of Claims in the instant case. The Court clearly made its decision in the *Art Metal* case apply only to the facts of that case, and made clear that it recognized the distinction between a claim which was defective and insufficient, and a document which set forth no claim at all for any year or for any specific amount. This distinction is made apparent by the following statement of the Court (47 F. (2d) top p. 560):

> * * * We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that the taxpayer had come to doubt the validity of any part of the tax. *In such cases* we may assume arguendo that much latitude would be allowed, not only to amend as to

> the amount demanded, but to amplify the grounds of the claim, and perhaps to set out others. (Italics ours.)

The foregoing language of the Court shows that the *Art Metal Construction Co.* decision is not in conflict with the decision in the instant case. Furthermore, the above language of the Court paves the way and leads up to that Court's further decisions on this point, which followed very soon thereafter.

On April 4, 1932, the same Court, speaking through the same Judge, rendered its decision in *McKesson & Robbins, Inc.* v. *Edwards*, 57 F. (2d) 147 (in which reference was made to its earlier decision in *The Art Metal Construction Co.* case) and on the same day it rendered its decision in *Solomon* v. *U. S.*, 57 F. (2d) 150. One week later the same Court rendered its decision in *Henry Prentiss & Co., Inc.* v. *U. S.*, 57 F. (2d) 676.

An examination of those last mentioned cases will show that there is no conflict in the position of the Circuit Court of Appeals, Second Circuit, with that of the Court of Claims in the instant case.

In *McKesson & Robbins, Inc.*, v. *Edwards, supra*, the Court found that the taxpayer timely filed a claim for refund which was insufficient in itself to support an action in court upon its rejection. Subsequently, and after the statutory period for filing claims had expired, taxpayer filed an amendment to its claim. The Commissioner considered the claim in light of the amendment and found an overpayment of tax. However, he refused to repay the amount so found overpaid and taxpayer instituted suit three days thereafter.

The Court held that there had been a compliance with the statute on the part of the taxpayer and that the suit could be maintained. The Court said:

> So far as we can find, he [the Commissioner] was free to reconsider, and his decision was in abeyance until he had finished his deliberation * * *. The plaintiff had every ground for supposing that its claim, which was in fact under consideration, at least until March 27, 1926, had not been finally rejected before * * *. Section 3226, Rev. St., like any other document, is to be read as sensible people would understand it * * *.

The Court further found that in its original claim the taxpayer had made a formal claim for a specific year and in the specific sum of $100,000, and that such claim stated no ground for its claim other than the phrase "amortization of war facilities." The Court held that this was an insufficient claim and did not satisfy the regulations, but that at least it was more than a mere caveat or warning that a claim would in future be filed; that the document did state that the taxpayer had a claim, although defectively. The Court then held that in such a situation "the taxpayer may amend even though the amendment is filed after the period for filing has expired," provided such amendment is filed before the final action of the Commissioner. The Court points to the decided cases, and says:

> But the distinction between what will bear amendment and what will not, is common throughout the land; *it is no doubt one of degree*, like most else, but there seems no reason not to apply it here. (Italics ours.)

The position of the Circuit Court of Appeals, Second Circuit, on this subject is further clarified by reference to its decision in *Solomon* v. *U. S.*, *supra*. There the taxpayer filed an insufficient claim for refund which was rejected, and the rejection scheduled. About two years later taxpayer applied to the Commissioner to have his case reopened to permit him to present a new ground for the allowance of the claim. The Commissioner *refused to reopen* the claim or to reconsider his rejection. The Court held that an amendment came too late when filed after rejection of the claim and that the Commissioner was within his rights to refuse to reopen the claim or reconsider his rejection upon the new grounds offered.

The same Court, in *Henry Prentiss & Co., Inc.* v. *U. S.*, *supra*, further clarifies its position. In the *Prentiss* case the claimant filed claim asking for special assessment for the year 1918. Before action of the Commissioner in rejecting the claim, but after the period for filing claims had elapsed, the claimant amended its claim setting forth grounds for allowance of its claim, different from those contained in the original

claim. The Court held that the filing of the amendment before final action by the Commissioner was sufficient to advise the Commissioner of the grounds upon which the claimant relied and was sufficient predicate for maintaining its claim on the grounds set up in the amendment.

From the foregoing decisions it patently appears that there is not a conflict in decision between the instant decision and that of *Art Metal Construction Co., supra.* As the Court so clearly points out in the *McKesson & Robbins* case, the *distinction between what will bear amendment and what will not bear amendment is one of degree only and the decision in each case must depend upon the factual aspects of each case.*

The decision in the instant case is predicated upon the particular facts in this record and as such is clearly distinguished from the facts in the *Art Metal Construction Co.* case. It is a question of degree only and the Court of Claims in the instant case has determined that degree to be sufficient, just as did the Circuit Court of Appeals, which decided *Art Metal Construction Co., supra,* on which the petitioner relies herein, and which said case was expressly referred to and distinguished by the same Circuit Court of Appeals in *McKesson & Robbins, Inc., supra.* The same Court, one week later, again made the same distinction in its decision in *Henry Prentiss & Co., supra,* and in effect followed its earlier decision in *McKesson & Robbins, Inc.*

8. The recent District Court decisions cited at top of page 5 of the instant petition are no wise in point—either in point of fact or in the application of the rule.

Marble Chair Co. v. *U. S.* (N. D. Ohio) 1932 Prentice-Hall Fed. Tax Service, p. 791, allowed the claims for 1919 and 1920 which had been amended and, as amended, considered by the Commissioner. The other claims which were held by the Court to have been insufficient were so held upon entirely different reasons than those here involved.

Elbee Chocolate Co. v. *U. S.* (E. D. N. Y.) *ibid,* p. 1469, held the claim to be insufficient on the ground that a petition filed in the Board of Tax Appeals was not an amendment to the refund claim, particularly in view of the fact that the claimant

was not the petitioner in the Board, and that the Board is a separate and distinct government body from the Bureau of Internal Revenue.

Bemis Bros. Bag Co. v. *U. S.* (E. D. Mo.) 56 F. (2d) 407, decided that an amendment to a claim made after rejection by the Commissioner, came too late.

The foregoing decisions, instead of being in conflict with the Court's decision in the instant case, are in entire accord with it.

9. The decisions cited in the second paragraph on page 5 of the instant petition do not conflict in principle with the decision below, in the instant case.

Solomon v. *U. S.*, 57 F. (2d) 150, decides that the amendment came too late after the Commissioner had rejected the claim and after he had refused to reopen or consider his rejection.

Jonesboro Grocery Co. v. *U. S.*, 66 Ct. Clms. 320, decides that where a refund claim had been rejected by the Commissioner in 1921, a refund claim filed approximately three years later, and which did not purport to be an amendment or amplification of the former claim, and which was filed after the statute had run, was not a sufficient claim to support the action.

Mutual Life Insurance Co. v. *U. S.*, 49 F. (2d) 662, deals with a situation in which a refund claim was considered and disallowed by the Commissioner in 1927. More than a year thereafter an application was filed *requesting that the claim be reopened* and reconsidered and allowed on an entirely new basis. This the Commissioner refused to do. The Court held that the grounds set up in the application to reopen did not support the action.

Sugar Land Ry. Co. v. *U. S.*, 71 Ct. Clms. 628, presents a situation where a claim for refund was rejected by the Commissioner after the statute had run. After such rejection claimant attempted to amend. The Court held that because the claim had been rejected there was no claim to amend and no claim to which the amendment might attach.

National Cattle Loan Co. v. *U. S.* (E. D. Ill.), 1932 Prentice-Hall Fed. Tax Service, p. 1259. In that case all of the refund claims had been finally acted upon, final conclusions com-

municated to the claimant, and the claims closed during the year 1926. Thereafter, and after the statute had run, the claimant sought to have the claims reopened but this was refused by the Commissioner. The claimant then sought leave to amend its claim but this was likewise refused. The Commissioner held that the attempted amendment came too late.

The brief resume of the above cited cases shows clearly that they have no bearing on the instant issue. They are entirely in accord with the principle announced by the Court of Claims in the instant case.

10. The Court of Claims in its decision in the instant case, and likewise in its two more recent decisions, *Memphis Cotton Oil Co.* v. *U. S.*, No. L–173, decided May 31, 1932, and *Lancaster Cotton Mills* v. *U. S.*, No. J–596, decided May 31, 1932, makes clear the distinction we urge here. That distinction is: (1) Where a claim has been rejected, an amendment comes too late because there is nothing to amend, (2) Where an amendment to a claim is made before the Commissioner has considered or acted upon a claim, and where the Commissioner considers and acts upon the claim *as amended*, with all of the facts and circumstances before him in so considering and acting upon the claim, his rejection of the claim will sustain an action for recovery of the refund upon the grounds set out in such amendment.

The decided cases, we believe, unanimously agree in principle and in result with the conclusions of the Court of Claims in proposition (1) just above set out.

With proposition (2) above, the decided cases are likewise in accord in principle, and the distinction made by those decisions where the result is different *is one of degree only* and turns solely upon a question of fact in each case. Such cases involve only the application of the principle to the facts of each case.

We respectfully disagree with the statement in the instant petition (near bot. p. 5) where it is said that the Court of Claims expressly recognized a conflict between its decision in *Memphis Cotton Oil Co.* (probably meaning *Lancaster Cotton Mills*) and

the decision of the Circuit Court of Appeals in *Art Metal Construction Co.* A reading of the Court's decision in *Lancaster Cotton Mills* discloses that the Court said: "We think this holding *as a general rule* is too limited as concerns the jurisdiction and authority of the Commissioner to act in the premises after the expiration of the period within which he may act without a claim, and as concerns the right of amendment before action is taken by the Commissioner." The Court then specifically points to the decisions of the Circuit Court of Appeals in *McKesson & Robbins, Inc.* and *Henry Prentiss & Co., Inc.*, wherein the Circuit Court of Appeals itself (the Court which decided *Art Metal Construction Co.*) in effect decides that *as a general rule* the decision in *Art Metal Construction Co.* was too limited and that such a general rule would not be applied in those cases but that on the contrary its application *would depend on the degree* to which it was applicable to a given state of facts. Thus it would seem to be apparent that the Court of Claims did not "expressly recognize" a conflict but, on the contrary, recognized that the *Art Metal Construction Co.* decision was to be applied only to the degree the facts of each case warranted. In other words, the Court of Claims took the same position relative to the *Art Metal Construction Co.* decision as did the Circuit Court of Appeals (which rendered it) in its more recent decisions, viz., *McKesson & Robbins, Inc.* and *Henry Prentiss & Co., Inc.*

11. *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, has no bearing on this issue in support of petition for certiorari. In that case claimant filed refund claim stating special assessment as the sole grounds in support thereof. Hearings were had and briefs filed and considered on that point. Upon partial rejection of the claim, suit was filed in the Court of Claims and an entirely new ground for refund was set up *in that suit. This new ground had never been presented to the Commissioner* at any stage of the consideration of the claim by him. Claimant contended that it would have been futile to present this new matter to the Commissioner because the Commissioner would surely deny it. The Court of Claims held that the

claim was good because claimant was not called upon to do a futile thing. This Court held that the Commissioner was entitled to be informed of any ground upon which claimant relied, and that since the Commissioner had no knowledge of such new grounds he could not have taken action with respect to it, and consequently there could not have been a waiver of a technical requirement because the Commissioner could not waive that of which he had no knowledge.

The decision of this Court was predicated upon a factual situation exactly opposite to that in the instant case. Here the Commissioner had all the facts before him *before he took up the claim for consideration*. The claim had been amended before any hearing or consideration had been had in the case. The Commissioner was fully advised and acted in light of all the facts.

The *Felt & Tarrant Mfg. Co.* case tends strongly to support the decision in the instant case, and offers no support whatsoever for the instant petitioner for writ of certiorari.

12. The instant case is not one of current importance. No apparent confusion exists in the decisions of the Courts on the point at issue here. In principle the Courts are all in harmony with each other, and are in harmony with the Supreme Court.

The *principle* involved is a settled principle. The application of that principle must of necessity depend upon the facts arising in each case. As we have pointed out, the Courts view the problem now as merely one of degree—in the application of an established principle.

The many cases which are arising in the courts are for the determination of the degree to which the established principle may be applied to the widely varying factual aspects of those numerous cases. We believe it unnecessary to argue that this Court may not permit itself to be called upon to hear and decide every such case and to direct the application of an established principle to the many cases wherein there is involved only the degree to which the facts support the principle.

A cogent reason for denying the writ in the instant case is pointed out by the Circuit Court of Appeals, Second Circuit,

in *McKesson & Robbins, Inc.* v. *Edwards, supra* (the same Court which rendered the decision in *Art Metal Construction Co.* v. *U. S., supra,* which is alleged by petitioner to be in conflict with the instant decision below) wherein the Court states that the distinction between those claims which will bear amendment and those which will not, is one of degree only. That Court distinguished its decision in *Art Metal Construction Co.* from its decisions in *McKesson & Robbins* and *Henry Prestiss Co.* and held that the claims in the latter cases would bear amendment. *The Court of Claims distinguished the instant case in like manner.* There is no conflict. The Court of Claims recognized that same degree of factual difference and its decision is in accord with the principle announced in the other cases, including *Art Metal Construction Co.* v. *U. S., supra.*

It is difficult to conceive how a decision by this Court in the instant case could be authoritative or decisive in every aspect of the application of this principle. The principle is so clearly stated by the Court below that the Treasury Department should find little difficulty in administering it.

That principle is sound. It is equitable. It is just.

No conflict is to be found in the decisions of the Courts on this principle.

CONCLUSION.

Wherefore, it is respectfully submitted that the decision of the Court of Claims was correct and in accordance with law; that this case does not present questions justifying the consideration of this Court on writ of certiorari; and that the petition for writ of certiorari should be denied.

J. GILMER KÖRNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
MYRON A. FINKE,
SAMUEL M. FISHER,
Of Counsel.

July, 1932.

FILE COPY

FILED
DEC 3 1932
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, PETITIONER,
v.
FACTORS & FINANCE COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT

J. GILMER KORNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
SAMUEL M. FISHER,
MYRON A. FINKE,
Of Counsel.

INDEX.

	PAGE
Opinion below	1
Question presented	1
Statutes and Regulations involved	2, 36–38
Statement	2
Summary of Argument	7
Argument	10
Refund Claim Herein is Sufficient to Support Suit	10
Refund Claim Gives Commissioner Jurisdiction to Grant Refund	10
Timely Claim May be Amended before Rejection	12
Neither Statute nor Regulations require Claim to Contain the Facts	12
Claim was not Rejected Prior to its Amendment	16
Amendment Did Not Constitute a New Claim	16
Claim was Properly Amplified under Statute and Regulations	20
Statutory Construction Supports Decision Below	22
This Cause Involves No New Principles	23
Cases Cited by Petitioner Do Not Support His Position	29
Cases Distinguished	29
Conclusion	35
Appendix A	36
Appendix B	39
Appendix C	40

CITATIONS.

CASES.

Art Metal Construction Co. *v.* U. S., 47 Fed. (2d) 558	24, 25, 27, 33
Bemis Bros. Bag Co. *v.* U. S., 60 Fed. (2) 944	34
Bonwit Teller & Co. *v.* U. S., 283 U. S. 258	11, 12, 23, 28, 29
Electric Pow. & Lt. Corp. *v.* U. S. (C. Cls. Nov. 14, 1932)	34
Factors & Finance Co., Inc., 56 Fed. (2d) 902, 73 C. Cls. 707	1
Felt & Tarrant Mfg. Co. *v.* U. S., 283 U. S. 269	32
Hart Glass Mfg. Co. *v.* U. S., 73 C. Cls. 32, Fed. (2d) 435	18
Jonesboro Grocer Co. *v.* U. S., 66 C. Cls. 320	33

Johnson *v.* U. S. (C. Cls. Nov. 14, 1932) 34
Lancaster Cotton Mills *v.* U. S., 59 Fed (2d) 270 27
Lasher *v.* U. S., 65 C. Cls. 295 12
Lehigh & Wilkes Barre Coal Co. *v.* U. S., 38 Fed. (2d) 637 .. 12
Lewis *v.* Reynolds, 76 L. Ed. 224, 48 Fed. (2d) 515 10
Maryland Casualty Co. *v.* U. S., 251 U. S. 342 21
McKesson & Robbins, Inc. *v.* Edwards, 57 Fed. (2d) 147 .... 12, 25, 26, 27
Memphis Cotton Oil Co. *v.* U. S., 59 Fed. (2d) 276 34
Mutual Life Ins. Co. *v.* U. S., 72 C. Cls. 204, 49 Fed. (2d) 662 34
New York & A. Lighterage Co. *v.* Bowers, 273 U. S. 346 23
Henry Prentiss & Co., Inc., *v.* U. S., 57 Fed. (2d) 676 ..... 25, 27
Solomon *v.* U. S., 57 Fed. (2d) 150 ..... 26, 33
Thomas *v.* U. S., 22 Fed. (2d) 1000 21
Tucker *v.* Alexander, 275 U. S. 228 ..... 12, 28, 29, 31
Union & N. H. Tr. Co. *v.* Eaton, 20 F. (2d) 419 ..... 10, 12
Updike *v.* U. S., 281 U. S. 489 23
Warner *v.* Walsh, 24 F. (2d) 449 ..... 10, 12
Wunderle *v.* McCaughn, 38 F. (2d) 258 12
Zeller *v.* U. S., 46 Fed. (2d) 1023 33

STATUTES.

Revenue Act 1921, c. 136, 42 Stat. 227, 268, 314, as amended by Act March 4, 1923, c. 276, 42 Stat 1504, 1505:
Section 252 36
Section 1316 (Sec. 3228 R. S.) 36
Section 1318 (Sec. 3226 R. S.) 37
Revenue Act 1926, c. 27, 44 Stat. 9, 66, 116:
Section 284 (U. S. C. App., Title 26, Section 1065) 10, 37

REGULATIONS.

Regulations 62, Article 1036 ..... 13, 37

RULINGS.

T. D. 3251, 5 C. B. 245 11
L. O. 1080, 5 C. B. 246 11
G. C. M. 9800, C. B. X–2, p. 271 11
T. D. 4265, C. B. VIII–1, p. 110 ..... 14, 15, 38

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, *Petitioner*,
v.
FACTORS & FINANCE COMPANY.

BRIEF FOR FACTORS & FINANCE COMPANY.

OPINION BELOW.

The opinion of the Court of Claims (R. 21) is reported in 56 Fed. (2d) 902, and in 73 C. Cls. 707.

QUESTION PRESENTED.

Respondent respectfully submits that the petitioner's statement of the question presented does not fully and adequately present the specific question arising upon this record. Upon the record in this case, the following is the real question presented:

Within the statutory period for filing claims for refund, respondent duly filed a claim for refund on Treasury Form 843 specifying the year and the amount claimed and stating that its tax liability had not been finally passed upon by the Commissioner, and that its claim was filed in order to save the taxpayer's rights under the pertinent statutes governing refunds of taxes and in order to permit the Commissioner to refund any excess paid over taxes actually found to be due. After the period for filing claims had expired, *but before the Commissioner had considered or passed upon its claim, and while*

the claim was still pending and awaiting consideration, respondent filed with the Commissioner an amendment and amplification of its claim for refund, specifically so designated, which set forth fully and completely the grounds relied upon and the data in support thereof. *Thereafter, the Commissioner took up the claim as amended for consideration*, held hearing thereon, determined that respondent had overpaid its taxes in the amount of $32,634.89, and in writing advised respondent to that effect. Thereafter, the Commission refunded to respondent $12,639.45, but refused to refund the balance of $19,995.44. The question is whether, in the circumstances of this case, a claim for refund, timely filed, for a specific year, for a specific amount, but which does not set forth the specific items causing an overpayment, could be amended and amplified *before the Commissioner had considered it or acted upon it*, so as fully to set forth all the facts and grounds in support of its claim for the overpayment determined by the Commissioner, and so as to enable it to maintain its suit for the recovery of the amount so allowed by the Commissioner.

STATUTES AND REGULATIONS INVOLVED.

The applicable provisions of the statutes and regulations involved are set forth in Appendix A (*infra*, p. 36).

STATEMENT.

The "Statement" contained in petitioner's brief purporting to be a summary of the facts found by the Court below, appears to be inadequate for a proper consideration of this cause, for the reason that certain facts found by the Court below, which are pertinent, material and significant to the issue herein, are omitted therefrom.

In stating the facts in his brief, the respondent has followed the narrative of petitioner, but has added thereto the additional findings of the Court below, which are deemed material, pertinent and significant herein. In order that attention may be drawn to those additional findings of the Court, the respondent has caused them to be italicized. The statement is as follows:

Respondent sued in the Court of Claims to recover an overpayment of $19,955.44 of income and excess profits taxes for the year 1917.

The Court of Claims found, among others, the following facts (R. 17–21):

June 15, 1918, plaintiff (respondent here) duly filed its income and profits tax returns for the calendar year 1917, and on or about that date paid to the collector the tax of $177,338.72 shown thereon. In May, 1920, the Commissioner assessed an additional tax of $267.32, which was paid June 29, 1920. In August, 1920, a further assessment of an additional tax of $25,327.91 for 1917, was made. In October, 1920, plaintiff paid $9,388.57 thereof and filed a claim for abatement of the balance of $15,933.34 (R. 17, Findings 2). In May, 1921, the Commissioner ordered an examination of the taxpayer's affairs and such examination was made and report thereon filed in August, 1922. This examination and report was made in connection with plaintiff's claim for abatement (R. 17, Findings 3). In January, 1923, the Commissioner advised the plaintiff that it had been over-assessed for the year 1917, and on February 9, 1923, plaintiff filed a brief with the Commissioner excepting to the proposed overassessment (R. 17–18, Findings 4).

February 27, 1923, *before the Commissioner of Internal Revenue had made and notified the plaintiff of his final determination in connection with his audit of plaintiff's tax liability for 1917 and of his final action on the claim for abatement*, plaintiff filed with the Collector of Internal Revenue for Rhode Island a claim for refund of $177,606.04 for the year 1917.[1] *This claim filed on Treasury Form 843 recited the amount claimed to be refundable and that said amount had theretofore been paid on June 15, 1918, and June 30, 1920. The claim was under oath and set forth that it was filed for the purpose of enabling the Com-*

[1]In the transcript of record in this Court, at page 11 thereof, the said claim for refund is incorrectly reproduced in that the amount claimed in the refund in item 6 is left blank. The Record below, in Exhibit A, which is made a part of the findings by reference in paragraph 5 of the Court's Findings of Fact, shows that the refund claim set forth in item 6 the amount to be refunded as $177,606.04. Exhibit A in its correct form is reproduced herein as Appendix B (*infra*, p. 39).

missioner to refund to the taxpayer any amount of taxes paid by it on account of the income and profits taxes for 1917 in excess of its true liability for that year, and that the true tax liability had not been finally determined by the Commissioner. The claim also stated that "claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save the taxpayer's right under the pertinent statutes covering abatements, credits, and refunds of income and excess-profits taxes for 1917, and to permit the Commissioner to refund to deponent any excess paid over taxes actually found to be due." This claim for refund was received by the Commissioner on March 20, 1923 (R. 18, Finding 5, also R. 11–12, Ex. A). *Before receipt of the claim for refund, the Commissioner had considered, audited, and reviewed the abatement claim* filed October 2, 1920, and had made certain adjustments in the 1917 tax liability resulting in the determination of an overassessment of $3,293.89. *These determinations and adjustments were in connection with the claim in abatement and were predicated upon the report of the internal revenue agent, made in connection with the abatement claim and upon statements submitted by the taxpayer in support of its claim for abatement of $15,933.34.* In November, 1923, a certificate of overassessment was sent to the plaintiff.

Upon receipt of said certificate of overassessment, plaintiff paid the balance of the taxes alleged to be due by the certificate of overassessment in the amount of $12,639.45, together with interest of $3,028.24. *The total tax paid by plaintiff for the calendar year 1917, representing original and additional assessments, amounted to $199,634.06, together with accrued interest of $3,028.24. The true and correct tax liability of the plaintiff on account of the income and excess profits tax for the calendar year 1917, under and pursuant to the pertinent provisions of the Revenue Act of 1917, was $166,999.17, being $32,634.89 less than the amount paid by the plaintiff, as aforesaid* (R. 18–19, Finding 6).

The Commissioner in his audit and consideration of plaintiff's claim for abatement, as aforesaid, did not consider or act upon the claim for refund filed February 27, 1923 (R. 18, last paragraph of Finding 5). *The Commissioner of Internal Revenue took no*

action with reference to the consideration or determination, prior to July 17, 1925, relative to the claim for refund filed February 27, 1923, or as to its allowance or its rejection (R. 19, first paragraph of Finding 7).[2]

On July 17, 1925, *and prior to any action being taken upon, or consideration or determination given to, the claim filed February 27, 1923, plaintiff duly filed with the Collector an amendment to its claim for refund of February 27, 1923, in amplification thereof.*[3] *In this amendment and amplification plaintiff stated, and specified, that its true tax liability should be determined pursuant to the provisions of Section 210 of the Revenue Act of 1917, which section provided that if the invested capital could not be satisfactorily determined, the profits tax should be computed in a certain manner. It asked that its claim theretofore filed February 27, 1923, be allowed in the amount claimed therein. The amendment and amplification calling the attention of the Commissioner to the pertinent provisions of existing law applicable to the plaintiff's claim for refund, and under which it was entitled to have its true tax liability computed and determined, likewise contained a statement of facts and certain data compiled from the income and profits tax returns for 1917 theretofore filed by the taxpayer.*[4] *The amendment also contained the statement that*

[2]Attention is respectfully directed to the statement of petitioner, at page 3 of his brief, stated to be a summary of the "facts found by the Court of Claims," that "the February, 1923, claim for refund was neither specifically allowed or rejected." Petitioner's statement is so phrased as to cause it to appear that the Court of Claims had found that the claim had been in effect rejected although not specifically rejected. The Finding of the Court is specifically to the contrary. The Court found as a fact that the Commissioner did *not* consider or act upon the refund claim, in his action upon the abatement claim, and that at no time prior to July 17, 1925, did the Commissioner take any action by way of consideration or determination of the refund claim, either as to its allowance or its rejection (R. 19, first paragraph of Finding 7).

[3]Attention is respectfully invited to the statement of petitioner, at page 3 of his brief, stated to be a summary of the "facts found by the Court of Claims," that "*respondent filed what was termed an amendment to and amplification of the previous claim.*" (Italics supplied.) The Court did NOT so find. The Court specifically found as a fact that the second claim was an amendment to, and amplification of, respondent's refund claim of February 27, 1923.

[4]Attention is called to the amendment and amplification at R. 12–14, showing that the data and information furnished the Commissioner therein were compiled from tax returns and documents *already* in the hands of the Commissioner of Internal Revenue. The amplification filed on July 17, 1925, is set out in Appendix C hereto.

"before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 claim for refund for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim, setting forth the details in the matter" (R. 19, Finding 7).

Thereafter, the Commissioner entered upon a consideration of the claim for refund and in connection therewith considered the amendment or amplification thereof filed July 17, 1925, and advised the taxpayer that a conference upon the claim would be held in the Commissioner's office on June 22, 1926, and that "all of the evidence as to law and facts, which you desire to have considered by the bureau in the final determination of the abnormality or abnormalities alleged, must therefore be submitted at once or as far in advance as possible of the date above fixed, in order that the fullest consideration may be given thereto." Thereafter, a hearing was held on June 22, 1926, in the office of the Commissioner at which plaintiff appeared and submitted evidence and data in support of his claim for refund (R. 19–20, Finding 7).

Thereupon the Commissioner considered plaintiff's original and amended claims for refund and the evidence in support thereof and held that the profits tax for 1917 should be computed under Section 210 of the 1917 Act. *Accordingly, he determined* that the true tax liability of the plaintiff for 1917 was $166,999.17, instead of $202,727.95, as theretofore assessed, and instead of $199,634.06 as theretofore collected. *The Commissioner therefore determined that plaintiff had paid as taxes $32,634.89 in excess of the true amount of tax due for 1917.* Accordingly, on January 13, 1927, the Commissioner advised plaintiff *by letter that "after a careful review of your protest and of all the evidence submitted in support of your contentions in a conference held in this office on June 22, 1926, you are advised that the bureau holds that your profits tax for the year 1917 should be computed under" Section 210 of the 1917 Act, and computed an overpayment of $32,634.89.* In the same letter the Commissioner notified the taxpayer that $19,995.44 of the determined overassessment and overpayment was barred from refund because the claim for refund of February 27, 1923, did not ask for special assessment, and *"your claim for refund filed July 18, 1925, amplifying*

the former claim" was not filed within the statutory period (R. 20, Finding 8; R. 14–16, Ex. C).

Thereafter, on April 8, 1927, the Commissioner executed and forwarded to taxpayer a formal certificate of overassessment on Treasury Form 776–C, setting forth the true tax to be $166,999.17 and the collections made in excess of the true tax to be $32,634.89 (R. 20–21). The said certificate of overassessment stated to the taxpayer: "Sirs: An audit of your income tax return, Forms 1031 and 1120, and a consideration of all the claims (if any) filed by you for the year 1917 indicates" the overpayment of $32,634.89 (Ex. R. incorporated by reference at R. top p. 21).

On June 21, 1927, the Commissioner refunded $12,639.45 of the overpayment of $32,634.89 but refused to refund the balance of $19,996.44 (R. 21, Finding 10). The Court of Claims gave judgment for the respondent (R. 26).

SUMMARY OF ARGUMENT.

A claim for refund is a claim or demand for the return of taxes overpaid. The issue raised by such a claim is whether there has been an overpayment, and, if so, the amount thereof. The reasons supporting a claim are in effect the evidence informing the Commissioner of the grounds for its allowance, which information is necessary for the determination of the issue raised by the claim. If the claim be timely filed, and the reasons, the grounds, and the information are supplied to the Commissioner before his consideration of the issue raised by the claim, and upon consideration thereof the issue is determined by finding there is an overpayment of tax, a suit may be maintained to recover such overpayment.

The rule is that a refund claim puts the Commissioner on notice that a demand is being made for the return of taxes overpaid, and that it is the duty of the claimant, before the Commissioner makes his determination thereon, to advise the Commissioner as to the reasons why the claim should be allowed so that the Commissioner may not be misled.

The rule is that a refund claim which is complete on its face, or which is made complete before it is considered or finally

acted upon, will support a repayment and a suit to enforce repayment.

The rule is that a refund claim which notifies the Commissioner that demand is made for the repayment of a specific amount, representing specific taxes overpaid, and for a specific year, may be amended or amplified prior to final determination thereon by the Commissioner, and that when the Commissioner considers the claim in light of all the information contained in the amendment, such amendment is not too late even though made after the time when the claim itself could have been filed.

The statute requires only that a claim shall be filed. The regulations provided that "the facts relied upon in support of the claim should be clearly set forth under oath." The regulations did not provide that all the reasons and the facts supporting the claim should be contained in the face of the claim. The amendment of the regulations made effective on May 1, 1929, is prospective only and clearly indicates that the regulations before that date did not require the claim to contain on its face the reasons and facts supporting the claim. The obvious intent of the regulations applicable here was to provide that the reasons and facts supporting the claim should be placed before the Commissioner to enable him to pass intelligently on the claim. Such matters were evidentiary and the time of the filing thereof was not of the essence.

In the instant case a refund claim was filed under oath on Form 843. It set forth the amount claimed, the kind of taxes overpaid, the year for which claim was made, and demanded the refund of a specific amount. It explained on its face why the grounds were not at that time more fully set out. The time for filing was about to expire, the Commissioner was examining respondent's records, and taxpayer was trying to preserve its rights. Later, when the Commissioner had determined its income and invested capital, taxpayer amended and amplified its claim by setting forth under oath, also on Form 843, all the facts relied upon in support of its claim. Ten months thereafter, the Commissioner advised taxpayer he would conduct a hearing on the claim. Hearing was held. Thereafter, the Commissioner considered the claim in light of its amendment and in light of all the facts submitted in support

of the claim and determined an overpayment of $32,634.89. He thereupon issued a certificate of overassessment in that amount.

Respondent's refund claim was timely filed and was properly amended so as fully to inform the Commissioner of all the reasons and facts relied upon in support of its claim. The Commissioner's action upon an abatement claim in November, 1923, did not constitute a rejection of respondent's refund claim; and the amplification and amendment of July 17, 1927, did not constitute the only refund claim in this matter.

A claim for refund is not intended as a means of preventing the repayment of taxes erroneously or illegally collected, but is intended as a method for enabling such overpayments to be refunded. The statutory provisions for refund claims are relief provisions and they should not be construed in such a manner as to prevent the relief which was intended to be afforded by them.

No new principle of law is involved herein. The Court below applied the general principles to the facts in this case and its application thereof was proper under all the circumstances of this case.

The cases cited by petitioner in his brief do not support his position herein. To the extent such cases are pertinent here, they support respondent's position.

The Judgment of the Court below was a just and proper Judgment and should not be reversed.

ARGUMENT.

THE REFUND CLAIM HEREIN IS SUFFICIENT TO SUPPORT THE REFUND DEMANDED AND TO MAINTAIN SUIT THEREFOR.

The Refund Claim was Duly Filed.

On February 27, 1923, respondent filed with the Collector of Internal Revenue of Rhode Island a claim for refund of $177,606.04 for 1917 (R. 18). At the time of the filing, the Revenue Act of 1921 was in effect. Section 252 of that Act provides that a refund shall be made if claim therefor was filed within five years after the return was due. Since the return was for the calendar year 1917, the return was due March 15, 1918. Five years from that date expired on March 15, 1923. The claim, therefore, was clearly filed within five years after the return was due, and the filing was timely. The Government does not deny this fact.

A Refund Claim Gives the Commissioner Jurisdiction to Grant a Refund.

Section 284 (a) and 284 (b) of the Revenue Act of 1926 constitute the Commissioner's authority (and mandate) to refund overpayments of income and profits taxes if claim therefor has been timely filed by the taxpayer.

A claim for refund is a claim or demand for the return of specific taxes in a specified amount overpaid for a specific year. Such a claim puts the Commissioner upon notice that a refund of such taxes is demanded and raises the issue as to such overpayment and the amount thereof. The tax liability of the claimant is thrown into issue. *Lewis* v. *Reynolds*, —— U. S. ——, 76 L. Ed. 224, 52 Sup. Ct. 145, affirming and quoting the pertinent portion of the opinion below in 48 Fed. (2d) 515. *Union & N. H. Tr. Co.* v. *Eaton*, 20 F. (2d) 419; *Warner* v. *Walsh*, 24 F. (2d) 449. See also cases cited by Court below in the instant cause (R. 25). The Treasury Department and the Bureau of Internal Revenue have repeatedly ruled that the issue involved in any tax case is whether or not the tax has

been overpaid. T. D. 3251, 5 C. B. 245; L. O. 1080, 5 C. B. 246; G. C. M. 9800, C. B. X–2, p. 271.

When a taxpayer timely files a claim for refund, the Commissioner is thereby empowered to do at least three things:

(1) He may determine, upon any grounds which he deems proper, that there has been an overpayment and advise the taxpayer that the claim has been allowed, and forthwith send a check for refund. *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258. This action may be taken whether or not all the facts supporting the claim appear in the face of the claim. The facts, upon which he made his determination, may be those in the Commissioner's own files. If he has a claim before him, he has the jurisdiction to make the refund. This Court will probably take judicial notice that such action by the Commissioner is of daily occurrence in the Bureau.

(2) He may consider the claim and find that he is without information sufficient to enable him to allow the claim. In such case, he may reject the claim, schedule the rejection, and notify the taxpayer that the claim is insufficient to support a refund. In such case, the taxpayer is without remedy (if the statute within which claim may be made has expired) because he can not force the Commissioner to reexamine his claim and he can not maintain a suit because the grounds therefor had not been furnished to the Commissioner.

(3) Prior to acting upon the claim, the Commissioner may receive from the taxpayer at the latter's initiative and/or he may call upon the taxpayer for facts or information, and upon receipt of such facts, may take up the claim for consideration in light of the facts which are all before him. If upon consideration of the claim, with all the facts thus before him, he determines favorably to the claimant, but refuses to pay the claim, a suit will lie to recover the amount determined to be refundable even though the facts were so laid before the Commissioner after the date when the original claim could have been filed. And it is quite immaterial that some of the facts, as in the instant case, were supplied by the respondent on a second Form 843.

The third alternative above is the situation presented in the instant case.

A Timely Refund Claim, Before its Rejection by the Commissioner, May be Amplified and Amended, so as to Support Refund and Suit Therefor.

The rule, now so general as to be practically universal, is that a claim which is amended prior to its consideration and final determination, and in time to place before the Commissioner all the facts relied upon in its support, is sufficient to support the refund and a suit for its recovery. *Tucker* v. *Alexander*, 275 U. S. 228; *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258; *McKesson & Robbins Inc.* v. *Edwards*, (C. C. A. 2d) 57 Fed. (2d) 147; *Lehigh & Wilkes Barre Coal Co.* v. *U. S.*, 38 Fed. (2d) 637; *Lasher* v. *U. S.*, 65 C. Cls. 295.

The taxpayer may, therefore, so long as his claim is undecided and pending, file with the Commissioner, under oath, a statement of all the facts relied upon in support of the claim.

The Commissioner having had before him, at the time when he considered the instant claim and determined the overpayment, all the facts in support of the claim, submitted under oath, the respondent may properly maintain this action for the recovery of the amount so determined to have been overpaid.

Neither the Statute nor the Regulations Required the Facts Submitted in Support of a Claim to be Contained on the Face of the Claim itself.

The *statute* makes no provision for the filing of anything but a claim. The content of the claim is not specified. *Union & N. H. Tr. Co.* v. *Eaton*, 20 F. (2d) 419, 421; *Warner* v. *Walsh*, 24 F. (2d) 449, 450; *Wunderle* v. *McCaughn*, 38 F. (2d) 258, 260. The provision as to all facts being stated in support of the claim is a provision by *regulation only* A regulation can interpret the statute only to the extent that it does not invade the legislative field and add to or subtract from the statute. In other words, a regulation is valid only if it is a reasonable regulation, *i. e.*, one designed to further the purposes of the statutory enactment. The question arises as to the reasonableness of the regulation in question. It can be held reasonable only to the extent that it furthers the purpose of the statute as outlined by this Court, in the cases hereinafter referred to. If it does not do that, it is an unreasonable regulation.

Precisely what were the provisions of the pertinent regulation?

Regulation 62, Article 1036, provided: "*Claims* by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843." (Italics supplied.) That is the only provision in the regulation referring to "claims." That regulation is consonant with the statute and is reasonable. Not one word is said in the regulation as to the content of the "claim." Apparently the Treasury Department was aware that an attempt to add to the legislative enactment by stating what the claim should contain, might be invalid.

Two sentences further down in the regulation it is provided: "All the *facts* relied upon in support of the *claim should* be clearly set forth under oath." (Italics supplied.) Nowhere in the regulation is there a statement, even by implication, that "all the facts" must be set out *in the claim*. The words "facts" and "claim" are used in the same sentence and obviously are not used as synonymous. If it had been the intent to regulate the claim, as the Government here contends, the obvious expression would have been "All the facts relied upon in support of the claim should be clearly set forth *in the claim*," or "The claim shall contain all the facts relied upon in support of it and the facts shall be stated under oath." It would appear clear that the regulation means only that the facts which are to be brought before the Commissioner in support of a refund claim must be clearly stated and be under oath. There is nothing in the regulation to give color to the contention that such facts can not be stated in a different document than the claim, or that the facts relied upon are not in support *of the claim* because they be filed at a different time from that of filing the claim. The instant petitioner would invoke a construction which would require that all the facts in support of the claim must be set forth on the face of the claim itself. Such a construction (not of the statute but the regulation in force at that time) would not be a liberal construction and would not be a construction tending to give the relief which the relief provisions of the statute were intended to give.

The action of the Secretary of the Treasury on March 27, 1928, discloses that the prior regulations did not require, and

were not intended to require, that all the facts submitted in support of a refund claim should be contained on the face of the claim. On March 27, 1929, the Secretary of the Treasury promulgated Treasury Decision 4265, C. B. VIII–1, page 110. This special Treasury Decision was an amendment to existing regulations. It is set out in Appendix A, *infra*. It will be noted that this Treasury Decision provides that although a claim will not be considered defective solely by reason of the fact that it is not made on the prescribed *form*, yet it will be deemed defective unless each ground upon which the refund is claimed is set forth in detail in the claim. It will be further noted that the Treasury Decision concludes with the statement that, "these regulations shall take effect on May 1, 1929, and *shall be applicable to all claims filed on or after such date*, and all other regulations are modified in so far as they are inconsistent with these regulations" (italics supplied). The language of the Treasury Decision is an amendment to existing regulations, and the amendment is specifically made prospective and not retroactive, and such amendment became effective on May 1, 1929. It is obvious that if the regulations had theretofore required that the details submitted in support of the claim should be contained in the face of the claim, the amendment contained in T. D. 4265 would not have been necessary. The effort of petitioner in the instant case is to construe the regulations in force from 1921 to May 1, 1929, as though T. D. 4265 had been in full force and effect throughout the period.

The second paragraph of T. D. 4265 is likewise pertinent. That paragraph provides that from and after May 1, 1929, amendments to a refund claim must be made within the statutory period provided for filing the claim itself. This recognizes the fact that such was not the regulation theretofore. The fact that it was necessary to amend the regulations so as to confine amendments to the time within which claims could be filed, shows that such was not the rule under the regulations prior to T. D. 4265. It has been heretofore noted that the *statute* makes no provision relative to the contents of a refund claim. The only regulation which provides for the contents of a refund claim is contained in T. D. 4265. Whether or not T. D. 4265 is consonant with the law is not pertinent here.

Whether consonant with law or not, it discloses clearly that before the promulgation of T. D. 4265 the regulations did not require that the details submitted in support of a claim must be contained in the face of the claim, or that amendments to a refund claim must be made prior to the expiration of the statutory period for filing the claim.

The Court's attention is invited to page 6 of petitioner's brief, wherein he states that taxpayer's claim was filed on February 27, 1923. He then says: "This was made out on Treasury Form 843 but it did not set forth any supporting facts as required by the regulations." The statement is erroneous in saying that it did not set forth any supporting facts. The Court will observe this error upon reading the Claim (R. 11-12). The statement is further erroneous in stating that the regulations required that the refund claim filed February 27, 1923, should contain the facts relied upon in support of the claim. It is important to note that *petitioner does NOT say* that the claimant failed *to set forth under oath all the facts relied upon in support of its claim.* Petitioner *does NOT* deny that the claimant set forth all the facts in support of its claim, and that such facts were filed with the Commissioner before the Commissioner acted upon the claim.

Petitioner's position herein is predicated on the sole fact that the claim of February 27, 1923, did not contain on its face all the evidentiary matter which was later submitted, under oath, to the Commissioner. Petitioner does not deny that such matter was so submitted prior to the time the Commissioner took up the claim for consideration, action or determination, or that such matters were considered by the Commissioner in reaching his determination on the claim.

In light of the foregoing, and of T. D. 4265, it is apparent that petitioner's position in the instant case is not supported by the statute or the applicable regulations.

The Court below pointed out the difference in the requirements for a refund claim which would support a refund by the Commissioner, and one which would support an action in court

to enforce payment. The law is clear that in order for a claimmant to maintain suit upon his claim the Commissioner of Internal Revenue must be advised of the grounds upon which claimant relies before the Commissioner makes his determination on the claim.

The facts in this record and the findings of the Court establish that before the Commissioner considered or passed upon the instant refund claim, he had before him all the facts, circumstances and reasons advanced by the claimant in support of its claim.

Petitioner seeks to avoid the application of the well established rule by two assumptions, both of which are contrary to the facts of record and contrary to the findings of fact by the Court. The petitioner first bases an argument on the assumption that there was a rejection of respondent's refund claim prior to the time of its amendment and amplification. The second assumption is that the amendment and amplification of the claim was not an amendment or amplification at all, but was a new and independent claim having no relation to the claim filed on February 27, 1923.

As stated above, both of these assumptions by the petitioner are contrary to the facts established in this case and found by the Court. A discussion of these assumptions of the petitioner will follow next hereinafter.

There Was No Rejection of the Claim and the Amplification and Amendment Thereof did not Constitute a New and Original Claim.

The petitioner assumes, contrary to the record, that the respondent's refund claim of February 27, 1923, had been rejected by the Commissioner prior to the filing of the amendment or amplification. This erroneous assumption of petitioner appears on page 7 of his brief, wherein he alleges that, "in effect," the Commissioner's action in November, 1923, on an *abatement* claim constituted a rejection of the claim for refund. *This contention is made for the first time by petitioner in his brief filed in this Court.* In this contention, petitioner has ignored the findings of fact made by the Court of Claims.

The Court below specifically found as a fact that such was not the case.

The last sentence in Finding 5 (R. near bot. p. 18) states:

> "The Commissioner in his audit and consideration of plaintiff's claim for abatement, as aforesaid, did not consider or act upon the claim for refund filed February 27, 1923."

Again, in the first sentence in Finding 7 (R. p. 19), the Court found:

> "The Commissioner of Internal Revenue took no action with reference to the consideration or determination prior to July 17, 1925, relative to the claim for refund filed February 27, 1923, or as to its allowance or its rejection."

In the second paragraph of Finding 7 (R. 19) the Court found:

> "On July 17, 1925, *and prior to any action being taken upon, or consideration or determination given to, the claim filed February 27, 1923*, plaintiff duly filed with the collector an amendment to its claim for refund of February 27, 1923, in amplification thereof." (Italics supplied.)

Again the Court said (R. 22):

> "The Commissioner did not consider or act upon plaintiff's claim for refund in connection with his consideration of the abatement claim."

There is ample evidence in the record to support the Court's findings. Exhibits "M" and "N" are made a part of the Court's findings by reference (R. bot. 19, top 20). The facts disclosed are these: Taxpayer amended and amplified its claim on July 17, 1925. The Commissioner took no action in regard to it until about ten months had elapsed. Then, on April 30, 1926, he wrote claimant that he proposed to reject the claim because no evidence had been submitted (Ex. M). The taxpayer replied (Ex. N) on May 8, 1926, and called the Commissioner's attention to the fact that *all the facts and*

data had been submitted nearly a year previously. Thereupon, on May 14, 1926, the Commissioner advised the claimant that a conference and hearing would be held on the claim. On June 22, 1926, the hearing was held and was the only hearing ever held on the taxpayer's refund claim. This was over three years after the claim for refund was filed and was about a year after it had been amplified and amended, and about a year after all the facts in support of the claim had been set forth under oath.

Respondent submits that an inference or assumption that the Commissioner had rejected the refund claim by his action on the abatement claim is unwarranted and unfounded in fact, and is contrary to the specific finding of the Court below. The effect of such an assumption would be to have the Commissioner reject a refund claim "unbeknownst to himself."

Respondent is not aware of the pertinence of the citation of *Hart Glass Mfg. Co.* v. *U. S.* 73 C. Cls. 32, 48 F. (2d) 435. It apparently has no bearing on the point for which it appears to be cited. The petitioner argues that the action of the Commissioner in November, 1923, upon an abatement claim (which was for the abatement of an unpaid assessment) was a rejection of a refund claim for the repayment of overpaid taxes, which claim was not then under consideration by him. Respondent does not see that *Hart Glass Mfg. Co.* v. *U. S.*, *supra*, in any wise bears on the argument on that point.

Based upon his assumption above discussed, the petitioner argues that since the claim for refund had been rejected, there was nothing to amend, and hence the formal amendment and amplification filed July 17, 1925, must stand alone and constitute the only claim in the case. Petitioner's argument on this point is likewise in conflict with the facts found by the Court below, and in conflict with the Commissioner's own statement of his understanding of the amendment, and in conflict with the statement on the face of the amendment itself.

The Court found these facts:

> On July 17, 1925 * * * plaintiff duly filed with the collector *an amendment to its claim for refund of February*

27, 1923, in amplification thereof. In this *amendment and amplification* plaintiff stated, and specified * * * [and] asks that *its claim theretofore filed February 27, 1923*, be allowed in the amount therein claimed. The *amendment and amplification* * * * contained a statement of facts and certain data compiled from the income and profits tax returns for 1917 theretofore filed by the taxpayer. The *amendment* also contained the statement that "Before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim setting forth the details in the matter." * * * Thereafter, the Commissioner entered upon a consideration *of the claim for refund* and *in connection therewith* considered the *amendment or amplification thereof filed July 17, 1925* * * * (R. 19.)

Thereupon, the Commissioner of Internal Revenue considered plaintiff's *original and amended claims* for refund and the evidence in support thereof * * *. (Italics supplied.)

Again, the Court said:

On July 17, 1925, * * * plaintiff prepared on the standard Treasury form and duly filed a claim for refund *as an amendment and amplification of the earlier claim.* The *amended claim* set forth specifically * * *. The Commissioner took up the consideration of *these claims.* Evidence in support of *the claims* was furnished by the plaintiff and hearings were held in the Commissioner's office * * *. (R. 22.) (Italics supplied.)

The Court further stated:

The *Commissioner of Internal Revenue* in his letter to the plaintiff of January 13, 1927, * * * *referred to the claim of July 17, 1925*, as "*amplifying the former claim.*" (R. 24.) (Italics supplied.)

In the face of the facts of record, the findings of fact made by the Court, and the Commissioner's own recognition of an *amplification of the former claim*, it would appear that petitioner's argument that the amendment of July 17, 1925, was an independent claim and the only existing claim in the case, is without factual warrant or foundation.

The Claim Filed February 27, 1923, was Properly Amplified under the Statute and the Regulations.

Continuing his erroneous assumption, the petitioner argues that the situation presented to this Court is similar to that presented by an amended declaration which seeks to set up a new cause of action or to bring in new parties.

In support of his argument, petitioner cites certain cases at bottom of page 9 and top of page 10 of his brief. These cases hold that in a law action an amendment, which sets up a new cause of action or brings in new parties, comes too late when filed after the statutory period for instituting the suit has expired. That principle is so well recognized as to need no citation of authority in its support. Those cases do not hold that an amendment to the original cause of action, which sets forth additional reasons and facts in support of the pending cause of action, may not be filed after the institution of the suit is barred. The amplification and amendment to the instant refund claim did no more than set forth facts and reasons why its claim for refund should be allowed. It complied with the existing regulations in setting forth under oath the facts *in support of the claim*. It did not constitute a claim *de novo*. On its face it shows and specifies that it was in support of, and in amplification of, its claim already on file, i. e., in support of the pending "action." For these reasons, the conclusion which petitioner attempts to draw from the cases cited in his brief, is a *non sequitur*. Those cases do not support his conclusion.

The same argument was made by petitioner to the Court below and is effectively answered in that Court's opinion at R. 24, *et. seq.* The fallacy of petitioner's argument is disclosed when it is remembered that the *issue* arising upon a refund claim is the overpayment of taxes for a specific year, and the amount thereof. That issue being raised by the claim, and being yet unheard and not considered, the claimant, under the regulations, filed a formal document in which "all the facts relied upon *in support of the claim*" were "clearly set forth under oath." The facts so filed were in support of the claim and bore upon and supported the issue raised by the claim

which had been theretofore filed. Certainly, the *issue* was never changed, and in his final determination the Commissioner passed upon that precise issue in light of the evidence submitted in support of the claim. *Maryland Casualty Co.* v. *U. S.*, 251 U. S. 342; *Thomas* v. *U. S.*, 22 F. (2d) 1000.

We have shown that the statute did not prescribe the contents of a refund claim and that until May 1, 1929, the regulations did not require the reasons to be set forth on the face of the claim, and that, therefore, the taxpayer was not required by law or regulations to plead all its reasons when it made its demand for refund.

But there is another reason why the refund claim filed by taxpayer on February 27, 1923, did not contain *on its face* all the facts and circumstances in support of the claim. This was not due to negligence or oversight. The claim sets forth on its face the reason why at that time it was unable to furnish the Commissioner all the grounds in support of its claim. The taxpayer explained that its 1917 taxes had not been finally passed upon by the Commissioner. That meant that its tax liability had not yet been determined. Until its tax liability had been determined the taxpayer could not know whether it had overpaid or underpaid its taxes. The time for protecting itself was about to expire, the Commissioner was engaged at that time in issuing additional assessments and in revoking them by certificates of overassessment. The taxpayer did not know, and could not know, whether or not the Commissioner would be able satisfactorily to determine its invested capital, and if so satisfactorily determined, whether or not its rate of tax, depending upon the adjustments to its net income and invested capital (both at that time undetermined), would entitle it to assessment under the special assessment provisions.

Application of the rule of reason here becomes apparent. Neither the law, nor the courts, demand the impossible of any one. The taxpayer did all it could do under the circumstances. Is it to be said the taxpayer must then have elected at its peril the grounds it would rely upon in support of its claim, when it was a legal and physical impossibility for it to ascertain what its grounds would be when the Commissioner had come to a conclusion as to its invested capital and net

income? Its time to file a refund claim was about to expire. It had to take some action to protect itself. If it then chose to elect to ask for a refund on the ground of special assessment, and thereafter the Commissioner had so adjusted its invested capital and net income that such relief would not be in order, then it would be liable to have its claim denied on the ground of "wrong reasons assigned." If it elected another ground, the result might have been the same. The Court below has seen this rule of reason and expressed it in its opinion:

> "We are of the opinion that the taxpayer may by amendment or amplification prior to action upon the claim for refund or rejection thereof by the Commissioner, bring to the Commissioner's attention the particular items of tax liability involved and set forth the detailed facts relied upon; and that a timely claim for refund may thus be amended prior to rejection even though a new or original claim might be barred by the statute of limitations. *Particularly is this true when at the time of filing the refund claim the Commissioner had under consideration the audit of plaintiff's tax liability for the year in question in connection with which no decision had been made and the amount of tax which the plaintiff might be called upon to pay had not been determined. Until this determination had been made plaintiff did not know what the basis of the Commissioner's final decision would be.*" (R. 23–24.) (Italics supplied.)

Upon the foregoing, and in light of the statute, the regulations and the reasons assigned by the Court below, it is submitted that respondent's refund claim was one susceptible of amendment and amplification.

UNDER GENERAL RULES OF STATUTORY CONSTRUCTION THE DECISION BELOW HEREIN SHOULD BE AFFIRMED.

Under the general rules of construction of statutes, so often enunciated by this Court, recovery was correctly allowed by the Court below.

The statutes under consideration are remedial and doubts

should be resolved in favor of the respondent in order to effectuate the remedy, while narrow and technical constructions should be avoided. If a substantial compliance with the statute can be found and if the Commissioner has been enabled to act intelligently on the claim and in knowledge of all pertinent facts, the decision of the Court of Claims should be affirmed.

Claims for refund are relief provisions to enable taxpayers to recover monies erroneously collected and illegally held by the Government. The provisions for refund claims were never intended as a means of preventing the repayment of such amounts. Such relief provisions should be construed so as to give the relief intended—not so as to prevent it. In *Bonwit Teller & Co.* v. *U. S., supra,* this Court, speaking to a similar point, said:

> The section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide.

The statute under consideration is part of the scheme of tax statutes. This Court has often recognized the rule that in case of doubt, such statutes must be construed in favor of the taxpayer, and has applied that rule to the provisions in taxing statutes relating to statutes of limitations. *U. S.* v. *Updike,* 281 U. S. 489, 496; *Bowers* v. *New York & A. Lighterage Co.,* 273 U. S. 346, 349–350.

NO NEW PRINCIPLE OF LAW IS INVOLVED HEREIN.

The instant case is not one of current importance. No apparent confusion exists in the decisions of the courts on the point at issue here. In principle, all of the courts are in harmony. No conflict exists among the decisions of the lower courts, or between those decisions and the decisions of this Court.

The principle involved is a settled principle. *Bonwit Teller & Co.* v. *U. S., supra, Tucker* v. *Alexander, supra,* and other cases cited *supra* herein.

The application of that principle must of necessity depend

on the facts arising in each case. The courts view the problem now as merely one of degree,—as the application of an established principle to the facts of a particular case.

The foregoing is clearly shown by an examination of the decision of the Circuit Court of Appeals, Second Circuit, in *Art Metal Construction Co.* v. *U. S.*, 47 Fed. (2d) 558, to which case petitioner refers on page 9 of his brief. Petitioner argues that the facts in that case are so nearly identical with those of the instant case as to render that decision in conflict with the decision herein. Such is not the case. The opinion in that case supports the position of respondent herein, and announces the same general principle as the other cases.

The *Art Metal Construction Co.* case was decided February 2, 1931. In that case it appears that the taxpayer filed a general claim for refund in the nominal amount of $1.00, without specifying the year for which claim was made or the amount claimed as erroneously collected. The Circuit Court of Appeals, Second Circuit, held that this was not a claim for refund but was merely a notice or warning that a refund claim might in the future be filed; that the supposed claim called for no action and was not susceptible of any action by the Commissioner; that it bore no evidence that the taxpayer had any present complaint in mind. The Court held that a claim subsequently filed for the year 1918 specifying the grounds therefor, but filed after the statutory period for filing, was not an amendment to the purported claim originally filed because the original document was not a claim at all but a mere notice that a claim would be filed.

The Circuit Court, in deciding the *Art Metal Construction Co.* case, in effect adopted the same principle laid down by the Court of Claims in the instant case. The Court clearly made its decision in the *Art Metal* case apply only to the facts of that case, and made clear that it recognized the distinction between a claim which was defective and insufficient, and a document which set forth no claim at all for any year or for any specific amount. This distinction is made apparent by the following statement of the Court (top p. 560):

> * * * We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner

> that the taxpayer had come to doubt the validity of any part of the tax. *In such cases* we may assume arguendo that much latitude would be allowed, not only to amend as to the amount demanded, but to amplify the grounds of the claim, and perhaps to set out others. (Italics supplied.)

The foregoing language of the Court shows that the *Art Metal Construction Co.* decision is not in conflict with the decision in the instant case. Furthermore, the above language of the Court paves the way and leads up to that Court's further decisions on this point, which followed very soon thereafter.

On April 4, 1932, the same Court, speaking through the same Judge, rendered its decision in *McKesson & Robbins, Inc.*, v. *Edwards*, 57 Fed. (2d) 147 (in which reference was made to its earlier decision in the *Art Metal Construction Co.* case) and on the same day it rendered its decision in *Solomon* v. *U. S.*, 57 Fed. (2d) 150. One week later the same Court rendered its decision in *Henry Prentiss & Co., Inc.* v. *U. S.*, 57 Fed. (2d) 676.

An examination of the last mentioned cases will show that there is no conflict in the position of the Circuit Court of Appeals, Second Circuit, with that of the Court of Claims in the instant case.

In *McKesson & Robbins, Inc.* v. *Edwards, supra*, the Court found that the taxpayer timely filed a claim for refund which was insufficient in itself to support an action in court upon its rejection. Subsequently, and after the statutory period for filing claims had expired, taxpayer filed an amendment to its claim. The Commissioner considered the claim in light of the amendment and found an overpayment of tax. However, he refused to repay the amount so found overpaid and taxpayer instituted suit three days thereafter.

The Court held that there had been a compliance with the statute on the part of the taxpayer and that the suit could be maintained. The Court said, at page 149:

> So far as we can find, he [the Commissioner] was free to reconsider, and his decision was in abeyance until he had finished his deliberation * * *. The plaintiff had every

> ground for supposing that its claim, which was in fact under consideration at least until March 27, 1926, had not been finally rejected before * * *. Section 3226, Rev. St., like any other document, is to be read as sensible people would understand it * * *.

The Court further found that in its original claim the taxpayer had made a formal claim for a specific year and in the specific sum of $100,000, and that such claim stated no ground for its claim other than the phrase "amortization of war facilities." The Court held that this was an insufficient claim and did not satisfy the regulations, but that at least it was more than a mere caveat or warning that a claim would in future be filed; that the document did state, although defectively, that the taxpayer had a claim. The Court then held that in such a situation "the taxpayer may amend even though the amendment is filed after the period for filing has expired," provided such amendment is filed before the final action of the Commissioner. The Court pointed to the decided cases, and said:

> But the distinction between what will bear amendment and what will not, is common throughout the law; *it is no doubt one of degree*, like most else, but there seems no reason not to apply it here. (Italics supplied.)

The position of the same Circuit Court on this subject is further clarified by reference to its decision in *Solomon* v. *U. S.*, *supra*. There the taxpayer filed an insufficient claim for refund which was rejected, and the rejection scheduled. About two years later taxpayer applied to the Commissioner to have his case reopened to permit him to present a new ground for the allowance of the claim. The Commissioner refused to reopen the claim or to reconsider his rejection. The Court held that the amendment came too late when filed after rejection of the claim and that the Commissioner was within his rights to refuse to reopen the claim or reconsider his rejection upon the new grounds offered.

The same Court, in *Henry Prentiss & Co., Inc.* v. *U. S.*, *supra*, further clarifies its position. In the *Prentiss* case the

claimant filed claim asking for special assessment for the year 1918. Before action of the Commissioner in rejecting the claim, but after the period for filing claims had elapsed, the claimant amended its claim setting forth grounds for allowance of its claim which differed from those contained in the original claim. The Court held that the filing of the amendment before final action by the Commissioner was sufficient to advise the Commissioner of the grounds upon which the claimant relied and was sufficient predicate for maintaining its claim on the grounds set up in the amendment.

From the foregoing decisions it patently appears that there is not a conflict in decision between the instant decision and that of *Art Metal Construction Co., supra.* As the Court so clearly points out in the *McKesson & Robbins* case, the distinction between what will bear amendment and what will not bear amendment is one of degree only and the decision in each case must depend upon the factual aspects of each case.

The decision in the instant case is predicated upon the specific facts in this record and as such is clearly distinguished on its facts from the *Art Metal Construction Co.* case. It is a question of degree only and the Court of Claims in the instant case has determined that degree to be sufficient, just as did the Circuit Court, which decided *Art Metal Construction Co., supra,* on which the petitioner relies herein, and which said case was expressly referred to and distinguished by the same Circuit Court in *McKesson & Robbins, Inc., supra.* The same Court, one week later, again made a similar distinction in its decision in *Henry Prentiss & Co., supra,* and in effect followed its earlier decision in *McKesson & Robbins, Inc.*

The principle which arises out of all these cases is aptly stated by the Court of Claims in *Lancaster Cotton Mills* v. *U. S.*, 59 Fed. (2d) 270, and is consonant with the decisions above reviewed.

The clear distinction as to which claims may be amended and which may not, shown by the cases, may be summarized as follows:

> (1) Where a claim has been rejected, an amendment comes too late because there is nothing to amend.

(2) Where an amendment to a claim is made before the Commissioner has considered or acted upon a claim, and where the Commissioner considers and acts upon the claim as amended, with all of the facts and circumstances before him in so considering and acting upon the claim, his rejection of the claim will sustain an action for recovery of the refund upon the grounds set out in such amendment.

The decided cases involve the determination of the degree to which the established principle may be applied to the widely varying factual aspects of numerous cases. We believe it unnecessary to argue that this Court does not desire to be called upon to hear and decide every such case and to direct the application of an established principle to the many cases wherein there is involved only the degree to which the principle is applicable to specific facts.

Respondent repeats that the instant case involves no new principle nor does the decision below extend the established principle. It would appear that the effort of the petitioner in the instant case is to reverse and break down the sound and salutary *principles* announced by this Court in *Tucker* v. *Alexander*, *supra*, and in the *Eonwit Teller & Co.*, case, *supra*, by the process of attacking each *application* of that principle. In effect, it is an endeavor to whittle away the controlling principle by constantly repeated efforts at refinements and distinctions, so that in the end the principle itself may be lost, or become so emasculated as to be inoperative. The clear and vigorous language of this Court in the two cases last above referred to, gives hope that such an effort will not succeed. This Court was not speaking idly when it said that "the statute and regulations must be read in the light of their purpose" and that "the section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide." Claims for refund are designed to assist taxpayers to recover money wrongfully collected from them. They are not designed as "traps for the unwary."

THE CASES CITED BY PETITIONER DO NOT SUPPORT HIS CONTENTIONS HEREIN BUT, ON THE CONTRARY, TEND TO SUPPORT THE CONTENTIONS OF RESPONDENT.

Much of petitioner's brief, *in so far as it relates to the instant case,* is devoted to an attempt to show that *Bonwit Teller & Co.* v. *U. S., supra,* and *Tucker* v. *Alexander, supra,* are not applicable here, and to show that certain other cases support his position herein. Respondent believes that little argument is necessary to disprove this.

In *Bonwit Teller & Co.* v. *U. S., supra,* the issue was whether certain acts and things done by the claimant and the Commissioner amounted to an informal claim which would bear amendment after the statute had run; and particularly where it was shown that at the time the Commissioner made his determination of an overpayment he had all the facts and circumstances before him. The Government insisted that no timely claim for refund was filed by plaintiff. This Court viewed all the circumstances and held that the Commissioner had, in effect, treated the various documents as a claim; that he was not misled or deceived; that at the time he made his determination of overpayment the Commissioner had all the necessary information before him; that the Commissioner was fully advised of the grounds for plaintiff's claim before he made his determination; that there was a substantial compliance with the statute; and that relief measures intended to give taxpayers an opportunity to secure refunds of overpaid taxes should be liberally construed to give the relief intended to be provided.

Petitioner suggests in his brief that the situation in the instant case must have been in the mind of this Court when it used the language quoted at page 14 of his brief. A glance will show that the suggestion is not well taken. It appears from the report of the *Bonwit Teller case* that the Government did insist that no refund claim was timely filed but the Court held that the Commissioner's action, in effect, treated the earlier documents as sufficient and that this treatment was warranted. But the suggestion is not applicable in any way to the

instant case. It can not be truly said that the Commissioner considered that the filing of the claim of February 27, 1923, did not constitute the filing of a claim. The very language of the Commissioner refutes the suggestion. The Commissioner makes specific reference to the refund claim in his letter of January 13, 1927, wherein he states:

> "With reference to the amount of the overassessment shown above which is outlawed, you are advised that *your claim for refund filed February 27, 1923*, or within the period of time allowed for the filing of claims, does not outline or specify an application for relief under the provisions of section 210 of the revenue act of 1917, and your claim for refund filed July 18, 1925, *amplifying the former claim* and outlining an application under section 210, was not filed within the statutory period." (Italics supplied.)

From the foregoing it would indeed appear strained for the Government to argue that the Commissioner refused to make this refund because no claim was filed. In the above quotation of one full sentence the Commissioner twice refers to the "former" claim "filed on February 27, 1923" and in the same sentence refers to the amplification of *that claim*.

Again, in the Certificate of Overassessment issued by the Commissioner to the taxpayer (see Appendix B to petitioner's brief), the Commissioner stated:

> "An audit of your income-tax return, Forms 1031 and 1120 and a consideration of all the claims (if any) filed by you for the year 1917 indicates that the tax assessed for this year was in excess of the amount due.
>
> Previously assessed:

Original, Account #8751475	$177,338.72
Additional, May, 1920, Page 19, Line 5	267.32
Additional, August, 1920, Page 10, Line 4	25,321.91
Total assessed	202,927.95
Tax liability	166,999.17

Overassessment indicated	35,928.78
Less: Overassessment, Schedule 7222	3,293.89
Balance	32,634.89
Overassessment outlawed	19,995.44
Overassessment allowable	12,639.45"

The foregoing constitutes the account stated. The self-serving declaration by the Commissioner that a portion of the account stated is subject to a defense under the statute does not change the nature of the account. The account remains the account stated.

Tucker v. *Alexander*, 275 U. S. 228, lays down the general rule which must govern. That general rule is a sound and reasonable one which aptly applies in the instant case. The Court said:

> The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery.

After making the foregoing statement, this Court gives its reasons as follows:

> If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose.

Petitioner's argument on *Tucker* v. *Alexander* is beside the point. In the instant case, the Commissioner accepted the sworn facts filed in support of respondent's claim and thereafter proceeded to consider and determine the claim in light of

the evidence so submitted. In doing this he was not waiving a compliance with the statute. The statute does not make it necessary to state on the face of the claim all the facts in support of the claim. Likewise, the Commissioner's own regulations contained no such requirement. This case does not involve the waiver of a statutory provision. Neither does it involve the waiver of the provisions of a regulation. But, even though it involved the waiver of a regulation, the Supreme Court has held that such regulations may be waived by the Commissioner in circumstances similar to those herein involved.

Petitioner calls attention to other decisions which he suggests are contrary to the decision below in the instant case. A brief analysis of each of them will show that such decisions are not contrary to the instant decision, but are consonant with and support the general principles upon which this case was decided below.

U. S. v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. In that case claimant filed refund claim stating special assessment as the sole grounds in support thereof. Hearings were had and briefs filed and considered on that point. Upon partial rejection of the claim, suit was filed in the Court of Claims and an entirely new ground for refund was set up *in that suit. This new ground had never been presented to the Commissioner* at any stage of the consideration of the claim by him. Claimant contended that it would have been futile to present this new matter to the Commissioner because the Commissioner would surely deny it. The Court of Claims held that the claim was good because claimant was not called upon to do a futile thing. This Court held that the Commissioner was entitled to be informed of any ground upon which claimant relied, and that since the Commissioner had no knowledge of such new grounds, he could not have taken action with respect to it, and consequently there could not have been a waiver of a technical requirement because the Commissioner could not waive that of which he had no knowledge.

The decision of this Court was predicated upon a factual situation diametrically opposite to that in the instant case. In the instant case the Commissioner had all the facts *before*

him before he took up the claim for consideration. The claim had been amended before any hearing or consideration had been had in the case. The Commissioner was fully advised and acted in light of all the facts. The *Felt & Tarrant Mfg. Co.* case tends strongly to support the decision in the instant case, and offers no support for the petitioner's position herein.

Art Metal Construction Co., supra, referred to by petitioner at page 9 of his brief, has been discussed herein, and has been shown to have no adverse bearing on respondent's position herein. It has been pointed out, on the contrary, that that case makes the very distinction for which respondent contends, *viz.*, that the application of the recognized general principle is one of degree only.

Zeller v. *U. S.*, 46 F. (2d) 1023 (C. C. A. 2d) reversed the lower court (35 F. (2d) 870) and in a short *per curiam* decision held that the case presented only variations in fact from *Art Metal Construction Co.* v. *U. S., supra,* which did not justify a different decision, and that the facts were even stronger for the defendant than in the former case.

We have pointed out hereinabove that there is no basis for contending that the Commissioner's action on taxpayer's abatement claim constituted a rejection of its refund claim. This renders pointless the reference to the cases cited by petitioner at bottom of page 9 of his brief. However, we would call attention to the fact that those cases, in their statement of the general rule and principle governing this line of cases, sustain and support the decision below in the instant case. We shall briefly point out the factual differences which distinguish them here.

Solomon v. *U. S.*, 57 F. (2d) 150 (C. C. A., 2d), has been discussed above. It decided that the amendment came too late after the Commissioner had rejected the claim and after he had refused to reopen or reconsider his rejection.

Jonesboro Grocer Co. v. *U. S.*, 66 C. Cls. 320, decided that where a refund claim had been rejected by the Commissioner in 1921, a refund claim filed approximately three years later, and which did not purport to be an amendment or amplification

of the former claim, and which was filed after the statute had run, was not a sufficient claim to support the action.

Mutual Life Insurance Co. v. *U. S.*, 49 F. (2d) 662, 72 C. Cls. 204, deals with a situation in which a refund claim was considered and disallowed by the Commissioner in 1927. More than a year thereafter an application was filed *requesting that the claim be reopened* and reconsidered and allowed on an entirely new basis. This the Commissioner refused to do. The Commissioner held that the grounds set up in the application to reopen did not support the action.

The Court, in *Bemis Bros. Bag Co.* v. *U. S.*, 60 F. (2d) 944 (C. C. A., 8th), decided that an amendment to a claim made after the rejection by the Commissioner, came too late.

We summarize by stating that none of the above cases is authority for a reversal of the Court below in the instant case. All of them are in accord with the general principle for which respondent contends.

At page 11 of his brief, petitioner argues, in effect, that the decision in the instant cause is wrong because (as he contends) some of the reasoning of the Court below is in error. To this respondent observes that if the decision herein is right it may not be reversed, even though this Court should be of opinion that some or all the reasons given for the decision are wrong.

To his brief, petitioner has appended reprints of two recent decisions of the Court of Claims, *Electric Power & Light Corporation* v. *U. S.*, and *Johnson* v. *U. S.*, both decided November 14, 1932. Both of these cases appear to bear specifically on the decision of the Court below in *Memphis Cotton Oil Co.* v. *U. S.*, 59 F. (2d) 276, which case is now pending on writ of *certiorari* at this present term of this Court. Respondent is not aware why these cases are appended to or discussed in petitioner's brief in the instant case. The *Memphis Cotton Oil* case will be argued at this term and possibly on the same day with the instant case. The *Memphis Cotton Oil Company* is represented by able and learned counsel who will present that case to this Court. The *Memphis Cotton Oil* case decision is not determinative of the issue in the instant case. It arises upon a different state of facts from that to be found in the instant record. The instant cause stands upon its own facts

and respondent herein respectfully refers this Court to the briefs and argument in that cause for a decision in that cause. Respondent has not sought to brief that cause.

CONCLUSION.

The decision of the Court of Claims is a just and proper decision and should be affirmed.

Respectfully submitted,

J. GILMER KÖRNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
MYRON A. FINKE,
SAMUEL M. FISHER,
Of Counsel.
November, 1932.

APPENDIX A.

STATUTES AND REGULATIONS INVOLVED.

Sections 252, 1316, and 1318, of the Revenue Act of 1921, c. 136, 42 Stat 227, 268, 314, as amended by Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, provide in part:

> SEC. 252. (a) That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1917, * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer.
>
> SEC. 1316. That Section 3228 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."
>
> This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.
>
> SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a

claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

This section shall not affect any suit or proceeding instituted prior to the passage of this act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress.

Section 284 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides:

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Article 1036, Treasury Regulations 62, promulgated under the Revenue Act of 1921, provides:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under

oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by an agent of the person assessed, but in such a case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

Treasury Decision 4265, C. B. VIII–1, page 110, approved by the Secretary of the Treasury on March 27, 1929, amending existing regulations, provides as follows:

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

APPENDIX B.

[Claim executed on Treasury Dept. Form 843 and filed February 27, 1923.]

CLAIM FOR
ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

Stillwater Worsted Company, Inc., Harrisville, R. I.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statements are true and complete.

	Period	Year
	From: Jan. 1	1917
	To: Dec. 31	1917
1. Business in which engaged: Manufacturing worsted goods.		
2. Character of assessment or tax: Income and excess-profits tax.		
3. Amount of assessment or stamps purchased		$177,606.04
4. Reduction of tax liability requested (income and profits tax)		$177,606.04
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$177,606.04
7. Dates of payment (see collector's receipts or indorsements of canceled checks): June 15, 1918–June 30, 1920. (If statement cover income-tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed: Providence, R. I.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked; period from ..... to		$

Deponent verily believes that this application should be allowed for the following reasons:

Claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save taxpayer's rights under the pertinent statutes governing abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due.

APPENDIX C.

[Amplification of Claim executed on Treasury Dept. Form 843 and filed July 17, 1925.]

CLAIM FOR
ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
X REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

STATE OF NEW YORK,
County of New York, ss:

Factors and Finance Co., Inc. (formerly Stillwater Worsted Co., Inc.), 257 Fourth Avenue, New York, N. Y.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

	Period From: Jan. 1 To: Dec. 31	Year 1917 1917
1. Business in which engaged: Manufacturing worsted goods.		
2. Character of assessment or tax: Income and profits taxes.		
3. Amount of assessment or stamps purchased		$177,606.04
4. Reduction of tax liability requested (income and profits tax)		$177,606.04
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$177,606.04
7. Dates of payment (see collector's receipts or indorsements of canceled check): statutory due dates. (If statement covers income tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed: Providence, R. I., or Hartford, Conn.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked: period from ..... to		$

Deponent verily believes that this application should be allowed for the following reasons:

Before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim, setting forth the details in the matter.

Taxpayer hereby makes application for assessment under the provision of section 210 of the revenue act of 1917 for the

reasons set forth in the attached sheets, and respectfully requests the tax adjustments shown thereon.

Statement attached to the 1917 refund claim of taxes of Factors and Finance Co., Inc. (formerly Stillwater Worsted Co., Inc.), 257 Fourth Ave., New York, N. Y.

REASONS:

(A) Taxpayer respectfully states that, if the tax is determined without the benefit of section 210, owing to certain abnormal conditions, it will work exceptional hardship upon the taxpayer, evidenced by the gross disproportion between the tax computed without the benefit of this section, and the tax computed by reference to the representative corporations specified in section 210. The abnormalities claimed are clearly indicated by the following percentages, which show a 104.8% return on investment, and a profits tax payment of 48.4% of its net income:

(a)	Invested capital	$369,954.27
(b)	Net taxable income	387,706.57
(c)	Excess and war profits taxes	187,629.43
(d)	Income taxes	12,004.63
(e)	Total tax	199,634.06
(f)	% which (b) is of (a)	104.8
(g)	% which (c) is of (a)	50.7
(h)	% which (c) is of (b)	48.4

FACTS:

(B) The reasons set forth in (A) above are predicated on the following facts, which compare taxpayer's 1917 tax data with that of representative concerns:

Statement attached to the 1917 refund claim of taxes of Factors and Finance Company, Inc. (Formerly Stillwater Worsted Company, Inc.), 257 Fourth Avenue, New York, N. Y.

	(a) Invested capital	(b) Net taxable income	(c) Excess and war-profits taxes	(d) Total taxes	% which (b) is of (a)	% which (c) is of (a)	% which (c) is of (b)
Taxpayer	$369,954.27	$387,706.57	$187,629.43	$199,634.06	104.8	50.7	48.4
Montrose Woolen Co.*			136,066.34	144,335.76			49.6
Montrose Woolen Co.†	237,562.94	274,258.06	88,899.73	99,999.15	115.4	37.4	32.4
Merion Worsted Mills					28.6		20.7
Empire Worsted Mills					30.0		23.0
American Association of Woolen and Worsted Mfrs. (compilation average)					43.1		2.79

*Before being granted relief under section 210.
†After being granted relief under section 210.

DESCRIPTION OF BUSINESS:

(C) The business of the Stillwater Worsted Co., Inc., was the manufacture and sale of men's worsted merchandise in the piece. The operations of this concern, during 1917, began with the purchase of yarn and proceeded thence with weaving and the various other processes required for the manufacture thereof into finished worsted goods in the piece.

INVESTED CAPITAL, ETC.:

(D) The Stillwater Worsted Company, Inc., ceased business operations at the end of 1911, and liquidated all of its assets and liabilities and retired all of its stock with the exception of eight (8) shares of common stock which were left for the purpose of keeping the corporation alive as an entity. The shell of the corporation continued thus through the years 1912, 1913, and 1914, the company during that entire period being quiescent and doing no business, of any nature, whatever. On January 1, 1915, the corporation again started operations, obtaining new capital, and continued uninterruptedly thereafter until December, 1919.

The annual net income and invested capital of the company, as determined by the department, is as follows:

Statement attached to the 1917 refund claim of taxes of Factors and Finance Company, Inc. (formerly Stillwater Worsted Company, Inc), 257 Fourth Avenue, New York, N. Y.

Year	Net Income	Invested capital
1911	$9,752.88	$66,673.72
1912	None.	800.00
1913	None.	800.00
1914	None.	800.00
1915	73,289.75	65,811.51
1916	187,330.36	171,009.79
1917	387,706.57	369,954.27

(E) The company did not have any governmental cost-plus contracts.

FILE COPY

Office Supreme Court, U.S.
FILED
DEC 10 1932
CHARLES ELMORE CROPLEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, PETITIONER,

v.

FACTORS & FINANCE COMPANY.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

J. GILMER KÖRNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
SAMUEL M. FISHER,
MYRON A. FINKE,
Of Counsel.

INDEX.

Long Continued Departmental Practice and Rulings will be given Great Weight 1
The Departmental Practice in Matters of Amendments to Refund Claims has been Judicially Determined 1
Departmental Rulings Indicate the Practice Administered 2

CITATIONS.

COURT CASES.

Alabama G. S. R. Co. *v.* U. S., 142 U. S. 615 1
Brewster *v.* Gage, 280 U. S. 327 1
Jackson *v.* U. S., 280 U. S. 183 1
Luckenbach S. S. Co. *v.* U. S., 280 U. S. 173 1
Magnolia Petroleum Co. *v.* U. S., 63 C. Cls. 173 ..... 1, 6

DEPARTMENTAL RULINGS.

G. C. M. 602, C. B. V–2, p. 97 4
L. O. 1116, C. B. III–1, p. 350 3
Regulations 14, pp. 25, 27, 28 2
T. D. 3240, 5 C. B. 313 ..... 2, 7
T. D. 4235, C. B. VII–2, p. 76 4
T. D. 4265, C. B. VIII–1, p. 110 ..... 5, 6

STATUTE.

Revised Statutes, §2226 6

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, *Petitioner*,
v.
FACTORS & FINANCE COMPANY.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

This Court has held that long continued departmental rulings and practice will be given great weight. *United States* v. *Alabama G. S. R. Co.*, 142 U. S. 615, 621; *United States* v. *Jackson*, 280 U. S. 183, 193; *Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173, 182; *Brewster* v. *Gage*, 280 U. S. 327, 336.

The departmental practice in the matter of amendments to refund claims has been determined judicially. In *Magnolia Petroleum Co.* v. *United States*, 63 C. Cls. 173, 188, in paragraph XX of the Findings, the Court found the following facts:

> XX. It had been for many years the consistent practice of the Bureau of Internal Revenue, where claims were filed within the statutory period, for taxpayers to amend their claims by asserting new grounds for refund and such amendments were accepted regardless of whether the statutory period within which claim might have been filed had expired or not. However, the amount claimed could not, under such practice, be increased by amendment. This unbroken practice of the Bureau continued until partially modified by the action of the Commissioner of Internal Revenue by his letter to plaintiff, dated January 18, 1924, and also partially modified by Law Opinion 1116, issued May 26, 1924, Internal Revenue Cumulative Bulletin III–1, page 350.[1]

[1]The modification in L. O. 1116 was that amendments came too late after the claim had been rejected.

Departmental rulings indicating the practice which was administered from 1921 to 1929 are:

Regulations No. 14, Revised, were approved by the Secretary of the Treasury and promulgated on January 25, 1916. These Regulations were entitled "Instructions Concerning the Abatement and the Refunding of Taxes and Penalties."

Regulations 14 apparently form the basis for the Regulations which followed, as will appear from paragraph one on page 25, and the first paragraph of subject matter on page 27. On page 28, in the last paragraph thereof, it is stated:

> Claims for the abatement and refunding of taxes and redemption of stamps, when received at this office, are recorded, and if they are afterwards returned to the collector for amendment, they should in all cases be returned to this office; *even if new claims are prepared, such new claims should be considered as amendments to the original claims and should be inclosed therein.* If for any reason the claims are returned to the claimants, claimants should be instructed to return the original claims. (Italics supplied.)

Treasury Decision 3240, 5 C. B. 313, approved by the Secretary of the Treasury and promulgated on October 31, 1921, which was not modified or revoked until 1928, contains the following provisions:

> Where any case in the Bureau of Internal Revenue has been finally closed after the taxpayer, or other party thereto, has had a hearing or has been afforded by written notice an opportunity to *present oral or written arguments or statements of fact in support of his contentions*, the case will not be re-opened except (1) where a showing is made of *new and material facts*, accompanied by an explanation, satisfactory to the Commissioner of Internal Revenue, of the failure to produce such facts prior to the closing of the case, or (2) where the case is materially affected by the change of regulations or by the final decision of another case either by the Commissioner of Internal Revenue or by a court of competent jurisdiction. The application for reopening a case should be addressed to the Commissioner of Internal Revenue, should state succinctly the facts and circumstances upon which the application is based, and must be supported by the affidavit of a person having knowledge of the facts.

> This decision is not to be construed as modifying the regulations relating to the filing of claims in abatement or claims for refund, nor as denying the right of a taxpayer to a hearing or to an appeal at any stage of his case until the case has been finally closed. *After the taxpayer has exhausted his remedies within the Bureau, however, and the case has been finally closed*, it will be reopened only under the conditions stated in the decision. (Italics supplied.)

The above ruling indicates that the *facts in support of a claim* may be presented either orally or in writing; and that *new and material facts* may be presented, upon reconsideration, after claim has been rejected.

Law Opinion 1116, C. B. III–1, p. 350, was approved by the Secretary of the Treasury and promulgated on May 26, 1924. Therein the executors of an estate had filed a refund claim and set out their grounds in support thereof. The claim was rejected *in toto* and thereafter the executors wrote a letter to the Commissioner asking for reconsideration of the claim on new and different grounds. The ruling held that since the claim had been rejected before the proposed amendment the claim would not be reopened upon the proposed amendment. The decision throughout is made to turn upon the principle that after the rejection of the claim, the claim might not be amended. However, in the course of the Opinion, it is said:

> * * * If a claim is submitted which does not sufficiently comply with the regulations to entitle it to consideration upon its merits by the Commissioner, it is, however, as will hereafter be shown, *sufficient to toll the statute of limitations relating to the filing of claims*,[2] and may also be considered a claim, subject to being perfected later, for the purpose of allowing interest thereon from six months after the date of filing, under the provisions of section 1324 (a) 3 of the Revenue Act of 1921. (Italics supplied.)

Further on in the same Opinion, it is said:

> It is conceivable that an elaboration of the grounds relied upon by a claimant to obtain a refund of taxes might, after his claim was filed, be desirable or necessary, and the insertion, under the prescribed regulations, of such additional matter in support of the grounds specified,

[2]See opinion of Court below in second full paragraph R. 23.

> would properly be denominated an amendment of the claim. This, however, is not such a case. Here the claimant set up an entirely new ground having not even the remotest connection with or reference to the grounds originally specified, and, *it is to be noted, not until some months after the original claim had been finally rejected.* (Italics supplied.)

General Counsel's Memorandum 602, C. B. V–2, p. 97, was promulgated in the Autumn of 1926. In that ruling, the taxpayer filed no claim for refund until after the expiration of the statutory period. However, before the expiration of that period, the taxpayer's brother, purporting to act on taxpayer's behalf, filed a claim for refund. The claim was in the name of the taxpayer, but was signed by the taxpayer's brother who stated that taxpayer was out of the country and that the claim was being filed under a general power of attorney which had been lost. After his return taxpayer filed a refund claim accompanied by an affidavit stating that he had given his brother a general power of attorney to act for him in all business transactions. The question was whether the refund claim filed by the taxpayer after the expiration of the statutory period would be considered an amendment of a claim filed on his behalf by his brother.

The Commissioner ruled that the timely claim filed by the brother was defective, but that such defect was one which could be remedied by later action, and held that such claim was perfected by the filing of a refund claim by the taxpayer himself after the statutory period had expired. The ruling further held that it was in harmony with Law Opinion 1116, *supra*.

Treasury Decision 4235, C. B. VII–2, p. 76, was approved by the Secretary of the Treasury and promulgated on October 23, 1928. It provides the circumstances under which claims will be reopened and reconsidered upon their merits after their rejection by the Commissioner, as well as the procedure to be followed. This Treasury Decision is in four paragraphs. Paragraph III is as follows:

> Any claim which has been disallowed will be reconsidered and allowed, at any time prior to the expiration of the

statute of limitations *for bringing suit*, if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening. (Italics supplied.)

Paragraph IV of Treasury Decision 4235 revokes Treasury Decision 3240, *supra*.

Treasury Decision 4265, C. B. VIII–1, p. 110, was approved by the Secretary of the Treasury and promulgated on March 27, 1929, and made prospectively effective as of May 1, 1929. That Treasury Decision is as follows:

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) *These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.* (Italics supplied.)

Treasury Decision 4265 was promulgated while the instant cause was pending in the Court of Claims.

The provisions of that Treasury Decision, by its terms, apply only to refund claims filed on or after May 1, 1929. The rule insisted upon in the instant case would apply the provisions

of that Treasury Decision retroactively, which is contrary to its provisions.

Since the rule announced in Treasury Decision 4265 became effective only on and after May 1, 1929, any action of the Commissioner prior to that time in applying such rule would not make correct or proper such action of the Commissioner.

Regulations and Treasury Decisions are the highest Departmental authority. They can be changed or modified only with the approval of the Secretary of the Treasury. They can not be changed or modified by any opinion or ruling of the Commissioner or of the Solicitor. Even if during the period involved herein the Commissioner or the Solicitor had issued rulings or opinions which were not in accord with the Regulations and Treasury Decisions, such rulings were nugatory and improper. If there were such, it would tend to show that the practice was at least irregular to the extent that the practice was not in accord with the Regulations. The Regulations appear not to have been changed until Treasury Decision 4265 changed them in 1929.

A claim for refund raises the issue as to whether or not there has been an overpayment, and the amount thereof. The *issue is not* as to the specific item upon which the refund will rest.

The departmental practice was such that the *amount claimed could not be increased by amendment. Magnolia Petroleum Co.* v. *United States, supra,* page 1. Therefore, since taxpayer could not anticipate the exact amount which the Commissioner would allow, it was forced by the departmental practice to claim the amount which it had paid.

If a claim is filed which notifies the Commissioner that the taxpayer is demanding a refund of specific taxes for a specific year, paid at a specific time and to a designated collector, and thereafter adduces facts, under oath, in support of that claim, and the Commissioner considers such facts and finds the overpayment, there has been a compliance with Section 3226 R. S. and the taxpayer may sue to recover. The initial claim does not have to have the same formality in order to give the Commissioner jurisdiction to consider the claim, as would be required to support a suit in Court in the first instance. The purpose of the law is to save litigation in the Courts and to

require that the Commissioner be fully advised of all the facts and grounds *before he makes his determination.* The law does not require that all the facts be submitted *prior to any consideration of the claim by the Commissioner.* T. D. 3240, *supra*, p. 2; T. D. 4265, *supra.*

This supplementary brief is filed pursuant to permission granted by the Chief Justice at the hearing of this cause on December 8, 1932.

Respectfully submitted,

J. GILMER KÖRNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
MYRON A. FINKE,
SAMUEL M. FISHER,
Of Counsel.

FILE COPY

DEC 12 1

In The Supreme Court of The United States

OCTOBER TERM, 1932

UNITED STATES OF AMERICA vs. FACTORS & FINANCE COMPANY, INC.	No. 141
UNITED STATES OF AMERICA vs. HENRY PRENTISS & CO., INC.	No. 234
UNITED STATES OF AMERICA vs. MEMPHIS COTTON OIL COMPANY	No. 308

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF

PERCY W. PHILLIPS.

Of Counsel:
BREWSTER, IVINS & PHILLIPS,
805 15th Street, N. W.,
Washington, D. C.

INDEX

	Page
Motion for Leave to File Brief Amici Curiae	1
Brief Amici Curiae	2
The Overpayment of Income and Profits Taxes for a Given Year Is a Single Cause of Action	2

CASES CITED

Anderson v. Farmers' Loan & Trust Co., 241 Fed. 787	5
Atlanta Casket Co. v. Rose, 22 Fed (2d) 800	5
Barry, Appeal of, 1 B. T. A. 156	5
Blair v. Birkenstock, 271 U. S. 348	3
Coughlin, Charles C., 15 B. T. A. 515	5
DeSabichi, Magdalena W., Appeal of 4 B. T. A. 445.	5
Felt & Tarrant Mfg. Co., 283 U. S. 269	7
Hickory Spinning Co., Appeal of, 1 B. T. A. 409	5
Hotel de France, Appeal of, 1 B. T. A. 28	5
Illinois Surety Co. v. United States, 215 Fed. 334	7
Krueger Brought Lumber Co., 18 B. T. A. 1270	6
Lewis, et al v. Reynolds, 284 U. S. 281	4
Peruna Co., The, 11 B. T. A. 1180	6
St. Louis & S. F. R. R. Co. v. Loughmiller, 193 Fed. 689	7
Sevier, Marion Shainwald, 14 B. T. A. 709	6
Wald v. Commissioner, 8 B. T. A. 1003	6

OTHER AUTHORITIES CITED

14 Op. A. G. 615	7
G. C. M. 9800, X-43-5266	5
L. O. 1080, 5 C. B. 246	5
T. D. 3251, 5 C. B. 245	5
Revenue Act of 1918, Section 252	3

In The Supreme Court of The United States

OCTOBER TERM, 1932

UNITED STATES OF AMERICA vs. FACTORS & FINANCE COMPANY, INC.	No. 141
UNITED STATES OF AMERICA vs. HENRY PRENTISS & CO., INC.	No. 234
UNITED STATES OF AMERICA vs. MEMPHIS COTTON OIL COMPANY	No. 308

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The undersigned, attorneys for taxpayers having cases pending in the Court of Claims and in the Bureau of Internal Revenue, involving questions similar to those in the above-named cases, respectfully move this Court for leave to file the subjoined brief as friends of the Court.

PERCY W. PHILLIPS.

Of Counsel:
BREWSTER, IVINS & PHILLIPS,

THE OVERPAYMENT OF INCOME AND PROFITS TAXES FOR A GIVEN YEAR IS A SINGLE CAUSE OF ACTION.

During the course of the oral argument before this Court in *United States of America* v *Factors & Finance* Inc., No. 141, the Assistant Attorney General, Mr. Rugg, made a statement to the effect that **claims for refund may be amended after the statute of limitations has run against the filing of a new claim provided the amendments set up no new cause of action.** During the course of the argument of each of the above entitled cases Mr. Rugg urged that the amendment relied on by the taxpayer set up a new cause of action.

We agree with Mr. Rugg's preliminary statement of law to the effect that amendments might be filed prior to action by the Commissioner on the original claims, provided they set up no new cause of action. This is completely analogous to established court procedure. Once jurisdiction is vested in the court, the original declaration or petition may be amended even after the statutory period of limitations has expired for the filing of a new petition, provided the amending petition or declaration sets forth no new cause of action.

The question, therefore, involved in the cases under discussion resolves itself into: what constitutes a cause of action for overpayment of income tax? We submit that **it is the overpayment of the tax for a given year that constitutes the cause of action**—not the method by which it is computed. Precedent clearly shows that the federal income and excess

profits taxes of any taxpayer for any given year constitute but a single cause of action. The ultimate question to be decided by the Commissioner, the Board of Tax Appeals, or the Courts in any federal tax controversey or case is: **how much has the taxpayer overpaid (or underpaid) his tax for the year?**

Section 252 of the Revenue Act of 1918, which is similar to sections of the other acts dealing with claims for refund, provides:

> "That if, upon examination of any return of income made pursuant to this Act * * * it appears that an amount of income, war-profits or excess-profits tax has been paid **in excess of that properly due,** then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of **the excess shall be credited** against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, **and any balance of such excess shall be immediately refunded** to the taxpayer. * * *"

This Court interpreted that section in *Blair* v. *Birkenstock*,, 271 U. S. 348. The question involved was whether a taxpayer was entitled to interest on an overpayment of a quarterly installment of its 1919 income taxes when at the time of the payment of the installment the correct amount of the tax for the year had not been paid. This court decided that there should be no interest on the overpaymentof the installment while there were still outstanding unpaid taxes for the year, saying:

> "Under Sections 250 and 252 of the Act of 1918, there is no provision for a refund to the taxpayer of any excess payment of a quarterly

> installment, when the whole tax for the year has not been paid. Read together, these sections show that the mere overpayment of an installment is treated as a payment on account of the tax which is assessed for that year, and is not a 'tax erroneously or illegally assessed or collected,' within the meaning of the refund provisions of Section 1019 of the Act of 1924, and so is not subject to its provisions regulating the allowance of interest."

This case clearly shows that while there may be an error in the computation of a Federal income or excess profits tax, that error does not give rise to a cause of action upon which a refund may be recovered. It is the **overpayment of the taxes for the year that is the cause of action** and not errors in individual items which are involved in the computation of the tax.

This principle is further emphasized in *Lewis et al* v. *Reynolds*, 204 U. S. 281. The Commissioner had asserted a deficiency in taxes against the plaintiff. The plaintiff paid the additional taxes and filed a claim for refund. The Commissioner found that the plaintiff was entitled to have his net income reduced by the items indicated in the refund claim, but at the same time the Commissioner found other additions to the plaintiff's net income offsetting the reductions conceded. Accordingly, though the statutory period during which the Commissioner could assert a further deficiency in taxes had run, he claimed that he could offset the items of reduction from income by the items that increased the income **because the sole cause of action before the court was the determination of whether there had been an overpayment of the plaintiff's taxes.**

This Court, after citing Section 284 of the Revenue Act of 1926 and Section 322 of the Revenue Act of 1928 adopted the following language of the Circuit Court of Appeals:

> "The above quoted provisions clearly limit refunds to overpayments. **It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax.** This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.
>
> "The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

The Treasury Department and the Bureau of Internal Revenue have themselves ruled that the question involved in any tax case is whether or not the tax has been overpaid. T. D. 3251, 5 C. B. 245; L. O. 1080, 5 C. B. 246; G. C. M. 9800, X-43-5266 (p. 18). See also *Anderson* v. *Farmers' Loan & Trust Company*, 241 Fed. 787, and *Atlanta Casket Co.* v. *Rose*, 22 Fed. (2d) 800.

The Board of Tax Appeals recognizes that there is but one cause of action before it (for any one taxable year) in any proceeding, namely, the correct amount of the tax for the year. *Appeal of Barry*, 1 B. T. A. 156; *Appeal of Hickory Spinning Co.*, 1 B. T. A. 409; *Appeal of Hotel de France*, 1 B. T. A. 28; *Appeal of Magdalena W. DeSabichi*, 4 B. T. A. 445; *Charles C. Coughlin*, 15 B. T. A. 515.

Accordingly, when a taxpayer has sought to amend a petition to the Board, after the expiration of sixty days from the Commissioner's notice of deficiency, the Board has refused to permit him to bring in a different taxable year which would constitute a new cause of action, *Wald* v. *Commission*, 8 B. T. A. 1003, but where no different taxable year is involved, the Board holds that a shift of theory, or reliance upon items of computation not previously mentioned, does not constitute setting up a new cause of action, for the only cause of action is the underpayment (or overpayment) of the year's taxes. In the *Peruna* case, 11 B. T. A. 1180, 1188, the Board said:

> "In determining whether an amendment states a new or different cause of action from that set forth in the original pleading **the nature of the action in general must be considered.** [Citation.] What is the nature of the action in general under the original petition? Can it be questioned that it is **the review by this Board of the final determination of tax deficiency for a certain period and that this, and no more, is asked by the amended petition?**"

See also *Krueger Broughton Lumber Co.*, 18 B. T. A. 1270; *Marion Shainwald Sevier*, 14 B. T. A. 709.

Similarly, when the Commissioner has once obtained jurisdiction of a valid original claim for refund (not a mere caveat) his power to determine an **overpayment**, is not limited to the theory, grounds or items of computation that might be the basis of determining it.

The receipt of the amending claim by the Commissioner is similar to the receipt of an amended

petition on declaration by a court. He may consider the new arguments under his original jurisdiction. (This is, of course, entirely different from cases where the new contentions are never presented to the Commissioner, but raised for the first time before a court, e. g. *U. S. Felt & Tarrant Mfg. Co.* 283 U. S. 269.) As was said in *St. Louis & S. F. R. R. Co.* v. *Loughmiller*, 193 Fed. 689:

> "When the petition, however inaccurately, imperfectly or inartistically drawn, is sufficient in allegations of fact to **show the claim** asserted therein by plaintiff **is based on the statute creating the right of action,** and is brought by the person on whom the statute confers such right, it may be amended at any time, and the amendment will relate back to the date of the institution of the action. [Citing cases.]"

See also *Illinois Surety Co.* v. *U. S.* Fed. 334, 339; 14 Op. A. G. 615.

No new cause of action having been set up by the amendments to the claims, under Mr. Rugg's concession they were properly received and should have been considered in the Commissioner's determinations.

The judgments of the courts below should be affirmed.

PERCY W. PHILLIPS.

Of Counsel:

BREWSTER, IVINS & PHILLIPS,
805 15th St., N. W.,
Washington, D. C.

CORRECTED COPY

p. 1

SUPREME COURT OF THE UNITED STATES.

No. 141.—October Term, 1932.

The United States of America, Petitioner, *vs.* Factors & Finance Company, Respondent.	On Writ of Certiorari to the Court of Claims.

[January 9, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The suit is by a taxpayer to recover $19,995.44, with interest, an overpayment of income and profits tax. Here, as in other cases decided at this session, the judgment stands or falls according to our determination of the time within which a notice of a claim for refund is subject to amendment.

On June 15, 1918, respondent, a corporation, filed an income and profits tax return for the calendar year ending December 31, 1917, and made payment of the tax in accordance therewith. The amount of the payment was $177,338.72. In May, 1920, the Commissioner made an assessment of an additional tax for 1917 in the sum of $267.32, which was paid by the respondent on June 29, 1920. In August, 1920, the Commissioner made another assessment of an additional tax for the same year in the sum of $25,327.91. On account of this additional tax respondent on October 4, 1920 made a payment of $9,388.57, and in the same month filed a claim for the abatement of $15,933.34, the amount of the unpaid balance. In connection with this claim for abatement the Commissioner made an order on May 6, 1921, for a full examination of the affairs of the taxpayer by an agent of the Bureau of Internal Revenue. Such an examination was made, and a report by the examiner was filed with his superior.

In February, 1923, the audit by the Commissioner was still incomplete, and the amount of the assessment not finally determined. The taxpayer was fearful, so it seems, that the time might

go by within which claims for overpayments were due under the law. To forestall any default it lodged with the Commissioner on February 27, 1923, a claim for $177,606.04 in terms of sweeping generality. It stated in so doing that there had been at that time no final audit of its return or assessment of the tax, and that the purpose of the notice was to save the taxpayer's rights under the applicable statutes "and to permit the Commissioner to refund to deponent any excess paid over taxes actually found to be due." There was no statement in this notice as to the grounds of the claim that the payments were excessive. No such statement was made until July 17, 1925, when there was filed with the Commissioner an amended claim for refund, setting forth the grounds in detail. In this amended claim the taxpayer explains the reasons why a special assessment should be made in accordance with Section 210 of the Revenue Act of 1917 (c. 63, 40 Stat. 300, 307), permitting that procedure where the amount of the tax cannot otherwise be determined with accuracy or justice. A copy of that section is quoted in the margin.*

In the interval between February, 1923 and July, 1927, there had been action by the Commissioner upon the claim for abatement which had been filed by the taxpayer in October, 1920. A claim for abatement, unlike a claim for refund, has relation to a tax assessed, but still unpaid. *Rock Island A. & L. R. R. Co.* v.

*Section 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

United States, 254 U. S. 141. The Commissioner declined to abate the whole amount of $15,933.34 withheld by the taxpayer, but did declare an overassessment of $3,293.89, leaving a balance of $12,639.45, with interest, then determined to be due. This balance the taxpayer discharged by payment to the Collector in November, 1923.

The claim for abatement had thus been disposed of, but no action had yet been taken upon the claim for refund. The Commissioner permitted this to slumber, without deciding or considering it, till after the filing of the amendment in July, 1925. Upon receipt of that amendment, or soon afterwards, he proceeded to a consideration of the claim upon the merits. There were hearings and rehearings at which the taxpayer gave evidence in support of its claim that its payments had been excessive and that there was need of a special assessment to arrive at a computation consistent with equity and justice. The Commissioner decided the merits of the controversy in favor of the taxpayer. He held that a case had been made out for a special assessment in accordance with Section 210 of the Revenue Act of 1917. He held, after computing the tax accordingly, that there had been an overpayment of taxes in the sum of $32,634.89. He held, however, that the notice of claim of February 27, 1923, was defective for failure to state the grounds of the taxpayer's objections; that the notice of July 17, 1925, was without avail as an amendment in respect of overpayments made in 1918 and 1920, since as to these it was too late; that it was good as an original claim for the refund of the overpayment made in November, 1923; and hence that of the total overpayments of $32,634.89 there should be a refund of $12,639.45, the 1923 instalment, with $3,028.24, interest paid thereon, and that as to the residue of the overpayments, $19,995.44, a refund should be refused. A very different case would be here if the Commissioner had ruled that no adequate reason for a special assessment had been established, and had refused relief upon that ground. We do not say that a justiciable controversy would then have arisen for a court. *Williamsport Co.* v. *United States,* 277 U. S. 551, 562; *United States* v. *Henry Prentiss & Co.,* — U. S. —, decided herewith. What he did was to find that there was need for a special method, that the application of such a method would reduce the tax by a stated sum, but that because of

defects in the form of the claimant's notice, there could be relief only in part. For the amount thus disallowed the taxpayer brought suit in the Court of Claims which overruled the action of the Commissioner and gave judgment accordingly. 56 F. (2d) 902; 73 C. Cls. 707. A writ of certiorari brings the case here.

We are holding in *United States* v. *Memphis Oil Co.*, — U. S. — that a general claim for refund, not specifying grounds, is subject to amendment until final rejection irrespective of a limitation running in the interval. We are holding in *United States* v. *Henry Prentiss Co., Inc.*, — U. S. —, that under the Revenue Act of 1918 a claim specifying as the sole ground for relief the necessity for a special assessment by reason of anomalous conditions prevailing in the claimant's business may not be turned by amendment into one for the revision of an assessment by increasing the value of real estate included in invested capital. The present case falls midway, or near to that, between the other two. Here the taxpayer did not specify any ground in the claim first presented, but offered an amendment afterwards setting forth the reasons why the assessment should be special.

The case is a close one, giving fair opportunity for argument either way, but we think the better reasons uphold the privilege of amendment.

1. The conclusion favorable to the privilege has support in the analogies of pleadings in a law suit. The claim in its original form is one for money had and received to the use of the respondent after the manner of the common counts in a suit at common law. It does not specify a particular state of facts, as did the claim in the *Prentiss* case, abandoning all others. It charges overpayment generally, and thus brings within its range whatever facts reside in the domain of equity and conscience.

2. The conclusion thus supported by the analogy of pleadings is not inconsistent with the necessities of administrative practice.

This is not a case where the grounds injected by the amendment have already been abandoned by agreement tacit or express. Such abandonment and agreement there was in the *Prentiss* case, the claimant seeking at the beginning the privilege of the special method of assessment and reverting thereafter to another ground of challenge which by implication, if not expressly, it had promised to renounce. This is a case where the claimant has left the grounds

of challenge open, and where the Bureau has itself to blame for not insisting at the outset upon a full disclosure of the grievance.

There are other elements of difference, however, besides the presence or absence of agreement, that divide the *Prentiss* case from this one. These other elements of difference are even more important, for the Prentiss ruling would have been the same if agreement had been absent. When the two cases are considered in the light of administrative practice a distinction is to be noted at the outset between the nature of a special assessment under the Revenue Act of 1918 [§ 327 (d)] and the nature of such an assessment under the Act of 1917 [§ 210]. The application in the *Prentiss* case was made under § 327 (d) of the Act of 1918, whereby the taxpayer, ignoring a possible challenge of the computation of invested capital, plants itself upon the ground of a variance between the statutory definition and the economic concept, and calls upon the Commissioner to exercise a dispensing power given to him, in circumstances of hardship, by the provisions of the statute. In an application for special relief under § 210 of the Act of 1917, the grounds of challenge are very different if the letter of the section is the measure of relief thereunder. The value of the invested capital under the statutory definition (Revenue Act of 1917, § 207) is not put aside in such circumstances as an irrelevant inquiry. On the contrary it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method. Under § 210 of the Act of 1917, the special method is not permissible unless "the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital." In brief, § 210 of the Act of 1917 is the precursor of § 327 (a) of the Act of 1918, and is not at all the analogue of § 327 (d). Cf. *Williamsport Co.* v. *United States*, 277 U. S. 551, 558.

We are not forgetful of the fact that by the regulations of the Commissioner and the practice of his Bureau, the distinction between the two acts has been obscured, if not destroyed. Relief has been granted under the Act of 1917 as if its provisions were the same as those of the act adopted later. Treasury Regulations 41, 1918, Art. 52; cf. R. H. Montgomery, Excess Profits Tax Assessment (1920), pp. 242, 243. The validity of the regulations, if applied to proceedings under the Act of 1917, is a question not now before us. The practice, we may say in passing, has not been left

unchallenged, but has been criticized in the Report of the Senate Committee for the Investigation of the Bureau of Internal Revenue. See Report No. 27, Pt. I, pp. 214, 215, *et seq.*, 69th Congress, First Session, 1925-1926. Certain at all events it is that an appeal to the Commissioner to exercise his jurisdiction under § 210 of the Act of 1917 is not confined to the occasions stated in § 327, (d) of the Act of 1918, if indeed it covers them at all. It is at least broad enough to give notice that jurisdiction should be exercised in accordance with the letter of § 210, upon the ground, that is to say, of the inability of the Commissioner to arrive at a conclusion as to value satisfactory to himself. Under § 327 (d) of the Act of 1918, a special assessment is not ordered except on the motion of the taxpayer, setting forth the special reasons why the statutory definition is oppressive, and why another method should be adopted. Under § 210 of the Act of 1917, as under § 327 (a) of the Act of 1918, the Commissioner acts of his own motion whenever he is unable to satisfy himself that the valuation will be accurate if there is adherence to the statute.

This question, if no other, he must have considered and determined when a claim for refund was submitted by the taxpayer without specifying the grounds. *United States* v. *Memphis Oil Co.*, — U. S. —. This question, if no other, he must again have considered and determined when he certified to the taxpayer, after the claim had been amended and after submission of the evidence, that § 210 of the Act of 1917 supplied the applicable rule. It is a question that in last analysis is addressed to his own conscience, and in the absence of any evidence impeaching his conclusion his certificate of satisfaction or the contrary is binding on the courts.

The cumulative force of these administrative opportunities and these procedural analogies upholds the claim and the amendment.

The judgment of the Court of Claims is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.